92-1978

No. 92-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

RESERVE NATIONAL INSURANCE COMPANY,

Applicant-Petitioner,

v.

RAY CROWELL AND MYRTLE CROWELL,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the $600,000 punitive damage award imposed against petitioner violates the Due Process Clause of the Fourteenth Amendment because it is grossly disproportionate to the $865.01 actual injury and because neither the trial court nor the Supreme Court of Alabama applied that State's standards for scrutinizing punitive damage awards to constrain in a constitutionally meaningful fashion, the jury's exercise of broad punitive discretion as was envisioned by this Honorable Court's opinion in ***Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. ___, 111 S. Ct. 1032, 113 L.Ed.2d 1 (1991).**

STATEMENT OF INTERESTED PARTIES

With the exception of former Reserve National employee Phillip Bailey, who does not seek a review of the judgment and verdict returned against him and does not join in this petition for certiorari, all parties to this case in the court below are listed in the caption. Pursuant to Rule 29.1 of the Rules of this Court, the parent company of petitioner Reserve National Insurance Company is Nationalcare Insurance Company; Reserve National Insurance has no non-wholly owned subsidiary companies.

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RESERVE NATIONAL INSURANCE COMPANY,

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RAY CROWELL AND MYRTLE CROWELL,

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To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

Reserve National Insurance Company (hereinafter referred to as "Reserve National") respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the Supreme Court of Alabama in affirming a $600,000 punitive damage award imposed upon it by the trial court. In upholding the punishment, the court below did not apply "the detailed substantive standards it has developed for evaluating punitive awards," ***Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1, 22 (1991)**, or otherwise engage in any analysis of the size of the punitive damage award.

OPINIONS AND ORDERS BELOW

The February 5, 1993 opinion of the Supreme Court of Alabama affirming the judgment of the trial court is reported at **614 So.2d 1005,** and is reproduced in Appendix A, **infra,** App. 1- 16. That court's March 19, 1993 order denying petitioner's Application for Rehearing is unreported and reproduced in Appendix B, **infra,** App. 17. The trial court's March 4, 1992 order denying petitioner's Motion for a New Trial and for Judgment Notwithstanding the Verdict, conditioned upon respondent's acceptance of a remittitur of $400,000 of the jury's $1,025,000 verdict, is unreported and reproduced in Appendix C, **infra,** App. 18-33. The trial court's March 30, 1992 Amended Judgment in favor of Respondents in the total sum of $625,000, is unreported and reproduced in Appendix D, **infra**, App. 34-35.

JURISDICTION

Petitioner articulated their federal constitutional objections to punitive damages at every stage of the proceedings in the Alabama courts. **See infra** pages 7-8. The Supreme Court of Alabama issued its opinion implicitly rejecting those arguments on February 5, 1993, and that court denied petitioner's Application for Rehearing on March 19, 1993. This petition is being filed within ninety days of the denial of rehearing. This Court has jurisdiction over this case pursuant to **28 U.S.C. § 1257(a).**

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "[N]or shall any State deprive any person of . . . property, without due process of law. . . . "

STATEMENT OF THE CASE

A. Statement of the Facts.

On September 2, 1988, Respondents applied for Medicare supplement health insurance policies with Reserve National Insurance Company through its agent, Phillip Bailey. Bailey indicated on the Respondent's application that they were not replacing Medicare supplement coverage even though it appears that the Respondents informed Bailey that they had existing Medicare supplement coverage with Liberty National Life Insurance Company. Bailey told the Respondents that if they paid the equivalent of two months premiums, they could obtain coverage with an effective date the same as the date of application and would receive a pre-existing benefits rider (PEB). The cost of the PEB rider was the amount of one month's premium.

Bailey was not sufficiently familiar with Reserve National's underwriting guidelines on this Medicare supplement policy and as a result mistakenly advised the Respondents about the effective date of coverage; in order to obtain coverage effective the date of application the minimum mode of premium had to be quarterly. In addition the Reserve National guidelines provided that

an applicant had to be replacing existing Medicare supplement coverage in order to be eligible for the PEB rider.

Upon receipt of the Respondent's application, the Reserve National underwriter contacted the agent and informed him of the Respondent's ineligibility for the PEB rider due to the fact that the application indicated they were not replacing existing Medicare supplement coverage. Bailey responded that the application was in error because the applicants were in fact replacing Medicare supplement coverage. The underwriter then advised Bailey to get the necessary paperwork done and into Reserve National as soon as possible. (Alabama law requires an executed replacement form in the replacement of Medicare supplement coverage and the application had to be corrected and initialed by the applicants.)

The agent never submitted the replacement form or the amended application to Reserve National's home office. When the time approached for the application to either be rejected and premium refunded or coverage issued on the application in its original form, the underwriter made the decision to issue Medicare supplement coverage without the PEB rider effective November 3, 1988, some two months after the application. Issuance of the policies in accord with the original application would allow the applicants to either accept the policies as issued or reject the policies and obtain refund if such was their desire.

Upon receipt of the policies issued effective November 3, 1988, Mrs. Crowell contacted Reserve National and explained that she was told coverage would be effective the date of application and was concerned because she

had huge medical bills in connection with heart surgery in October of 1988. Reserve National then backdated the effective date of the Crowell's policies in order to cover Mrs. Crowell's health claims incurred in October of 1988.

During the month of November of 1988 agent Bailey was terminated by Reserve National for lack of production.

In January of 1989, Mr. Crowell incurred claims for prostate surgery, a condition which admittedly pre-existed his application with Reserve National. The amount of his prostate claim that would have been covered under his Reserve National policy if it had had a PEB rider was the total sum of $865.01. The claim was denied pursuant to the pre-existing exclusion of Mr. Crowell's Reserve National policy.

In October of 1989 the Crowells' daughter wrote Reserve National explaining what agent Bailey had advised her parents about the effective date and the PEB rider at the time of application. This letter was received by one Reserve National employee who passed it along to his supervisor. Apparently this letter simply got filed without appropriate review by the supervisor and went unanswered.

The subject lawsuit was filed and the former agent, Bailey, was finally located and deposed. Bailey testified that he had in fact told the Crowells that they could obtain an effective date the same as the application date and could also receive the PEB rider with paying the amount of two months premium with their application. He stated that he told the Crowells what he understood to be the underwriting guidelines of Reserve National.

Upon reviewing the underwriting guidelines for the subject policies during his deposition, he admitted that he had not reviewed the guidelines during the application process with the Crowells and that he mistakenly gave the Crowells incorrect information. Shortly after Bailey's deposition, Reserve National paid into Court for the benefit of the Crowells the amount of the claim plus interest.

This case was tried to the jury which returned a verdict in favor of the Plaintiffs for $25,000.00 in compensatory damages (solely on mental anguish) and $1,000,000.00 in punitive damages against both Reserve National and Bailey.

The trial court's order on post-trial motions, found the punitive damage award of the jury in the amount of $1,000,000.00 to be excessive and ordered a remittitur of $400,000.00 thereby reducing the punitive award to $600,000.00. The Respondents accepted the remittitur and Petitioner appealed to the Alabama Supreme Court from the judgment entered pursuant to the trial court's order on post-trial motions. On February 5, 1993, the Supreme Court of Alabama issued its opinion affirming the trial court's $600,000.00 punitive damage judgment. That court denied Petitioner's Application for Rehearing on March 19, 1993. On March 23, 1993 Petitioner applied to the Alabama Supreme Court for a stay of execution on the punitive damage portion of the judgment pending its petition for certiorari to this Court. That court denied the Application for Stay the next day, March 24, 1993. On April 2, 1993, this Court granted Petitioner's Application for Stay of the judgment of the Supreme Court of Alabama pending filing and review of the Petitioner's Petition for Writ of Certiorari.

B. Presentation of the Federal Question to the Alabama Courts.

Neither the trial court nor the Supreme Court of Alabama explicitly addressed Petitioner's due process challenges to the punitive damage award. Instead, each court simply stated that the Alabama law required no particular relationship between the punitive award and the actual loss. Nonetheless, Petitioner expressly raised its Federal due process objections to the imposition of punitive damages in this case at every stage of the proceedings in the courts below.[1] Thus, Petitioner has fully complied with all procedural requirements under Alabama law.[2]

Petitioner has specifically raised below the question of whether due process was violated based on the wide disparity between the punitive damage award as compared to the actual loss, 685:1, more than triple the disparity found to be "close to the line" of constitutional

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[1] **See Appendix E, infra, at App. 36,** Answer of Petitioner Reserve National; **Appendix F, infra, at App. 37-38,** Petitioner's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for Remittitur; **Appendix G, infra, at App. 39-40,** Petitioner's Brief to the Alabama Supreme Court; **Appendix H, infra, at App. 41-47,** Petitioner's Application for Rehearing in the Alabama Supreme Court.

[2] By raising the federal constitutional challenges "in the pleading stage" and reasserting them post-trial and on appeal, petitioner fully complied with the Alabama procedural requirements for raising such claims. **See *Alabama Power Co. v. Capps*, 519 So. 2d 1328, 1330 (Ala.)** (challenges to constitutionality of punitive damages must be raised prior to trial), ***appeal dismissed*, 486 U.S. 1002 (1988).**

impropriety in ***Pacific Mutual Life Insurance Company v. Haslip*, 113 L. Ed. 2d at 23.**

There can be no doubt that Petitioner fully and adequately presented its Federal constitutional claims to the Alabama courts and therefore this Court has jurisdiction to review the question presented in this petition.

REASONS FOR GRANTING THE WRIT

In ***Pacific Mutual Life Insurance Company v. Haslip*, 113 L. Ed. 2d at 20**, this Court noted "unlimited jury discretion – or unlimited judicial discretion for that matter – in fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." In ***Haslip***, the jury returned an award of punitive damages between four to fives times that of its compensatory damage award and more than two hundred times the actual damages. **113 L.Ed.2d at 23.** This Court found in ***Haslip*** that the Petitioner had the full protection of Alabama procedural safeguards relating to punitive damages both at the trial court on post-judgment motions and again at the appellate court in review of the trial court's ruling on the post-judgment motions through independent review at each level. In upholding the jury's award, however, the Court noted:

> While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety.

113 L.Ed.2d at 23.

In the instant case, however, the Alabama Supreme Court failed to apply the standards of ***Green Oil Company v. Hornsby*, 539 So. 2d 218 (Ala. 1989)**, which this Court found were necessary to establish "a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages" for the purposes of the Due Process Clause. **Pacific Mutual Life Insurance Company v. Haslip, 113 L. Ed. 2d at 22.**

The trial court in its order on post-judgment motions did tacitly apply *Green Oil* criteria and found the jury's award of $1,000,000.00 in punitive damages to be excessive. **(Order on Post-Trial Motions; Appendix C, App. 18-33)**. Yet with no explanation, the trial court exercised *its* own discretion in concluding that an appropriate award of punitive damages should be $600,000.00. **(Amended Judgment of trial court; Appendix D, App. 34-35)**.

It is the trial court's award of $600,000.00 in punitive damages from which the Petitioners appeal. The Alabama Supreme Court made no separate and independent *Green Oil* analysis of this substituted punishment awarded by the trial court. It simply noted that the trial court had conducted the *Green Oil* review and did not abuse its discretion in awarding $600,000.00 in punitive damages. ***Reserve National v. Crowell*, supra, 614 So.2d at 1010.** In *Haslip*, this Court relied upon *independent* appellate review applying *Green Oil* standards to the trial court's award as an additional check on the trial court's discretion when it approved Alabama's procedure with regards to determining whether a punitive award was reasonable,

rational and in compliance with due process. **113 L. Ed. 2d at 21-22.** Without this independent appellate review of the trial court's substituted punitive damage award, an essential component of the due process protections which were presumed by this Court in ***Haslip*** is lacking. Petitioner would submit that the lack of this essential component has effectively deprived it – and all others similarly situated – of the due process protections guaranteed by the Fourteenth Amendment.

The unchecked result in the instant case is an arbitrary and capricious punishment that is "grossly out of proportion to the severity of the offense" and has no "understandable relationship to compensatory damages" or to the "goals of deterrence and retribution." Thus, the punitive award violates the Due Process Clause as is interpreted by ***Haslip***. This Petition should be granted, the judgment below should be vacated and the case remanded to the Alabama Supreme Court for reconsideration in light of ***Pacific Mutual Life Insurance Company v. Haslip***.

A. The Petition Should Be Granted Because the Alabama Courts Refused to Address the Petitioner's Federal Due Process Challenges and Failed to Adhere to Alabama's Procedures for Reviewing Punitive Damage Verdicts.

The Alabama Supreme Court has refused to address this Petitioner's due process challenges to the punitive award set by the trial court in its order on post-trial motions.

Indeed, the Court made only the most cursory reference to this issue in its opinion, writing as follows:

> Reserve National contends that the award of punitive damages violated its due process rights because the amount of the award was over 600 times the amount of the Crowells' out-of-pocket expenses. However, "the essential purpose of punitive damages would be thwarted if we required that they conform to any mathematical equation." ***Associates Financial Services Co. v. Barbour*, 592 So.2d 191, 199 (Ala. 1991).** Therefore, Reserve National's contention that the award of punitive damages violates its constitutional rights is without merit in this case.

Reserve National Insurance Company v. Crowell*, Appendix A, App. 9, 614 So.2d 1005, 1009 (Ala. 1993).** Petitioner never sought a mathematical equation in the court below, but simply contended that the disparity between the punitive award and the actual loss "crossed the line" of what this Court, in ***Haslip, considered an acceptable compliance with constitutional due process.

While ***Haslip*** was under consideration by this Court, the Court vacated the substituted punitive damage award entered by the trial court in ***Southern Life and Health Insurance Company v. Turner*, 571 So.2d 1015 (Ala. 1990).** Shortly after this Court's opinion in ***Haslip***, the court remanded ***Southern Life and Health Insurance Company v. Turner*** to the Alabama Supreme Court to be reviewed in light of the ***Haslip*** decision. ***Southern Life and Health Insurance Company v. Turner*, 499 U.S. ___, 111 S.Ct. 1678, 114 L.Ed.2d 73 (1991).** The Alabama Supreme Court on remand, however, refused to address whether the disparity between the punitive award and actual loss violated Federal due process. ***Southern Life and Health Insurance Company v. Turner*, 586 So. 2d 854 (Ala. 1991).**

Instead, the court simply again affirmed the punitive damage award stating that:

> imposing . . . a relationship [between compensatory and punitive damages] would inevitably result in injustice, and we decline to impose it.

586 So. 2d at 858. Thus, the Alabama Supreme Court clearly elected to interpret ***Haslip*** as sanctioning its ***Green Oil*** review procedure so as to avoid considering the disparity issue in the due process context. Yet, Petitioner would point out that the very first criteria of ***Green Oil*** requires the trial court and then appellate court of Alabama to determine whether there is a rational relationship between the punitive award and the actual harm. ***Green Oil v. Hornsby*, supra, 539 So.2d at 223.** Alabama's opinions, post-*Haslip*, reveal that it does not follow this very first criteria of its own review procedure.

Even the West Virginia court in ***T.X.O. Production v. Alliance Resources, Inc.*, 187 W.Va. 457, 419 S.E.2d 870 (1992)**, made an attempt to analyze the disparity issue in the Federal due process context. Alabama, however, continues to march forward as if ***Haslip*** only exists to congratulate Alabama on its review procedures. Thus, it would appear that this Court's reliance upon the Alabama procedures already in place to supply adequate due process protections is misplaced.

If Alabama ***Green Oil*** procedures, which form the basis of the holding in ***Haslip*** are to be taken seriously by this Court, then the Alabama courts must be instructed with equal seriousness that those procedures must be actually followed and must yield constitutionally reasonable and just punitive judgments. Despite this Honorable

Court's decision in ***Haslip***, the Alabama Supreme Court has consistently chosen not to fully apply this Court's holding with regard to the post-judgment review of punitive damages awards. To date, the Alabama court has chosen to recognize that this Court upheld Alabama's punitive damage review prodedures, but at the same time has consistently refused to address the proportionality aspect of the ***Haslip*** decision, wherein this Court recognized that a ratio of 4-5:1 between punitive and compensatory damages and 200:1 between actual out-of pocket expenses and punitive damages was "close to the line". **113 L.Ed.2d at 23.**

Indeed, in the decisions released by the Alabama Supreme Court which even address this issue, the Court has, just as in the instant case, rejected the application of any sort of mathematical equation/ratio between compensatory and punitive damages and/or actual and punitive damages. For example, in ***Associates Financial Services Company of Alabama v. Barbour*, 592 So.2d 191, 199 (Ala. 1991)**, the Alabama Supreme Court addressed this issue as follows:

> Associates urges us to read to read ***Haslip*** literally to require that punitive verdicts may never exceed a "multiple four or five times" compensatory damages. We decline to do so.
>
> The essential purpose of punitive damages would be thwarted if we required that they conform to any mathematical equation. . . . Therefore, we are not willing to adopt the proposition that punitive damages must be mathematically proportionate to the compensatory damages awarded.

However, not all members of Alabama's High Court have agreed with this position. Since the release of this Court's decision in ***Haslip***, Justice Maddox has written to specially concur with the majority in order to note that the proportionality language in ***Haslip*** would indicate problems with the punitive awards upheld by the majority. **See *Southern Life and Health Insurance Company v. Turner*, supra, 586 So.2d at 859-861** (majority upholds punitive damage award ratio of 499:1; Maddox concurs in result only).

As previously stated, the Alabama Supreme Court did not actually follow ***Green Oil*** review procedures in its review of the punitive award from which this appeal is taken, i.e. the award by the trial court in its post-judgment order of remittitur. Instead, it simply noted that the trial court adhered to the ***Green Oil*** procedures in its analysis of the jury verdict and did not abuse its discretion in doing so. **(Appendix A, App. 12, 614 So. 2d at 1010.)** As noted in ***Haslip***, unlimited judicial discretion in fixing punitive damages enjoys no greater favor than unlimited jury discretion, **113 L.Ed.2d at 20**, especially where, as in the instant case, the results are triple what this Court has found to be "close to the line" of due process violation.

In its award of punitive damages in the amount of $600,000.00 for an $865.01 actual loss, the trial court offered no explanation whatsoever of how its substitute punishment fulfilled, in a rational fashion, the State's avowed objective of retribution and deterrence. Even the Respondents appear to concede that the trial court simply substituted its judgment for that of the jury offering no definitive basis for its award of punitive damages. **(Appendix I, Excerpt from Respondents' Brief to Alabama Supreme Court)**.

Although the trial court's award was some $400,000.00 less than that of the jury, the trial court's substituted punishment leaves the Petitioner with less procedural safeguards than it had with the jury's award. At least the trial court in assessing the jury award tacitly applied ***Green Oil*** review criteria. To date, no court has independently reviewed the correctness of the trial court's $600,000.00 award of punitive damages under the ***Green Oil*** standards.

In order to appreciate why the review procedures in place in Alabama do not provide compliance with due process, one has to analyze the actual practice in Alabama, its own interpretations, and lack of application of its own procedures. The instant case is but another illustration.

Petitioner would submit that once a jury has run wild due to lack of sufficient guidance from jury instructions approved in Alabama, Alabama's review procedures as interpreted by the Alabama Supreme Court, do not provide sufficient protection to safeguard a defendant's rights of due process. One major flaw in Alabama's post-judgment criteria is that once the trial court determines the jury award of punitive damages to be excessive, it then makes its own, totally discretionary, assessment of what the punitive damage award should be subject only to the "maximum recovery rule" as defined in ***Warren v. Ford Motor Credit Company*, 693 F.2d 1373 (11th Cir. 1982)** (diversity case applying Alabama law). The Alabama "maximum recovery rule" permits reduction of the verdict only to the maximum amount the jury could have possibly awarded. Therefore, the trial court's review, even under ***Green Oil*** is not an independent review;

instead, the trial court's award must be the maximum the jury could possibly have awarded. This result, Petitioner would submit, was not what this Court envisioned when it decided ***Haslip***.

The trial court's substituted assessment of punishment, pursuant to the "maximum recovery rule" is not subject to independent appellate review pursuant to ***Green Oil*** criteria, as this Court was led to believe in ***Haslip***, but rather is subject to review only for abuse of discretion as indicated in the instant case. Instead of independently reviewing the trial court's substituted punitive award, the Alabama Supreme Court has held, post-*Haslip*, that it *must* give the substituted award the presumption of correctness. ***Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414, 421 (Ala. 1991).** The decision in ***Armstrong*** was five to three. Justice Maddox, in writing for the dissent, noted that this Court's approval of Alabama post-judgment review criteria was bottomed on "independent review" by the trial court and the appellate court; he pointed out that the majority opinion in ***Armstrong*** illustrates that the independent review found "meaningful and adequate" by this Court in ***Haslip*, 113 L.Ed.2d at 21**, is far different from the manner in which Alabama actually applies ***Green Oil*** review criteria. ***Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d at 426.** The net result is a defendant, having failed to receive a just determination from the jury, is then saddled with the maximum punitive award possible, rather than a fair and independent determination by the trial court subject to independent review by the appellate court. Surely this procedure does not satisfy fundamental fairness and does not fulfill the defendant's

right to due process as was envisioned by this Court in ***Haslip***.

The root of the problem concerning punitive damage awards in Alabama in the due process context begins with inadequate guidance to the fact finder. The epidemic of large and disparate punitive awards in Alabama originates in a system which, in essence, instructs the jury to award, in its total discretion, the amount of punitive damage it feels appropriate based on the enormity of the wrong and the need to deter like conduct. **See, e.g. *Schwertfeger v. Moorehouse*, 569 So.2d 322 (Ala. 1990); *Randell v. Banzhoff*, 375 So.2d 445, (Ala. 1979), *cert. denied*, 444 U.S. 1081 (1980).** To a lay jury, such is a declaration of open season with no bag limit. As Justice Brennan pointed out in his concurring opinion in ***Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S. Ct. 2909, 2924, 106 L.Ed.2d 219 (1989)**, "[g]uidance like this is scarcely better than no guidance at all".

Petitioner is aware that the majority of this Court in ***Haslip*** found no particular problem with the above jury instruction and the breadth of discretion it allows. ***Haslip*, 113 L.Ed.2d at 21**. The difficulty is that with lay jurors, many of whom being at least as interested in redistribution of wealth as they are in rendering justice, this type of jury instruction has proven woefully inadequate. In fact, such instruction does not really limit the discretion of the jury in awarding punitive damages, but rather is supportive of the typical plaintiff's "send a message" argument. To the business and insurance industry the "message" has been loud and regular, but seldom

does it bear any resemblance to justice and fundamental fairness.

Admittedly, this very instruction has been part of the Alabama law for longer than the current epidemic of disparate punitive damage awards. It is indeed unfortunate that lay jurors too often now view insurance companies and other target defendants with disdain and appear ready to infer ill will where, at most, there is only careless mistake or error. This Court cannot correct the social phenomena of "us against them", but it can insure procedural safeguards to prevent appropriation of property without due process of law.

The Alabama courts appear to address the problem with establishing criteria for review of punitive damage awards without adherence to their own criteria. History has taught us that the guidance of ***Haslip*** has not been sufficient to safeguard a defendant's due process rights in Alabama and perhaps other jurisdictions. The problem appears to grow rather than diminish post-*Haslip*. The question is not whether, but when, this Court of last resort must act to restore sanity and fairness to our system of justice which too often approves windfall punitive damage recoveries which appropriate property of defendants without due process of law.

B. The Question of Whether the Punitive Damage Award Imposed in This Case is Constitutionally Excessive, Is Important and Worthy of Review.

This Court in ***Haslip*** noted that it cannot draw a "bright line" as to the amount of punitive damages which will be violative of due process in every case. Such is not

requested by Petitioner and was not requested by Petitioner in the courts below. As stated in ***Haslip***, however, a sufficiently wide disparity between the punitive award and actual loss will rise to a violation of the Due Process Clause.

Haslip has been criticized by legal writers for not providing adequate guidelines or parameters to give sufficient stability to rampant punitive awards. However, Petitioner is of the opinion that ***Haslip*** did provide significant insight into what this Court considered to be "close to the line" of a due process violation in reviewing the disparity between punitive award and actual loss. The lower courts, and particularly those in Alabama, have simply chosen to ignore such guidance.

This Court's finding of 200:1 (punitive to actual) and 4:1 (punitive to compensatory) as being "close to the line" of due process violation in a case where there was actual knowing theft of Mrs. Haslip's and other's premiums, clearly should have been instructive to the courts below in reviewing a 685:1 (punitive to actual) and 24:1 (punitive to compensatory) disparity where an agent erroneously advised the insureds of what they were eligible for and then failed or even intentionally refused to correct his mistake.[3] If 200:1 is close to the line in a case with the considerably more egregious facts of ***Haslip***, does not 685:1 with the facts of the instant case, cross that line?

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[3] As previously noted, the compensatory award was entirely based on the Crowell's mental anguish.

The disparity between punitive award to actual loss in this case is even greater than is found in *T.X.O. Production v. Alliance Resources, Inc.*, **supra**, where the disparity was 526:1. The amicus curiae brief of the Alabama Business Council in *T.X.O. Production* **(Appendix J)** together with the dissent of Justice Maddox in *Southern Life and Health Insurance Company v. Turner* after remand from this Court **(Appendix K)** illustrate the probability that this Court has been misled in reliance on the Alabama courts' realistic adherence to its own punitive damage review criteria. This case, Petitioner submits, is but another illustration of the realistic inadequacy of this State's review criteria. Review procedures established by the Alabama courts or by this Court are meaningless without adherence.

The question of whether the punitive damage award by the trial court under the facts of this case is so grossly excessive as to violate due process is substantial and worthy of review.

CONCLUSION

In *Haslip*, this Court held that, under the appropriate circumstances, the Due Process Clause of the Fourteenth Amendment may render a punitive damage award "constitutionally unacceptable," **113 L.Ed.2d at 20**, and, for the first time, scrutinized a punitive damage award to determine whether it comported with due process. This Court has again returned to scrutinize the mandates of due process with regard to punitive damage awards this term in *T.X.O. Production*. Petitioner in this case would

respectfully submit that it is entitled to have the $600,000 punitive damage award imposed upon them subjected to the same level of constitutional scrutiny. The Petitioner recognizes that the misapplication of a constitutional rule announced by this Court, even one that, as in the instant case, produces a palpably unconstitutional judgment, does not necessarily warrant review by this Honorable Court. This petition, however, directly tests the confidence in the Alabama courts upon which this Court has previously relied in sustaining the award of punitive damages in ***Haslip***. If the Alabama procedures that form the basis for upholding the verdict in ***Haslip*** are to be taken seriously by this Court, then the Alabama courts must also be instructed that they must follow these procedures scrupulously and must yield constitutionally reasonable and fair judgments. Therefore, this petition should be granted and the case set for plenary consideration.

June 14, 1993

Respectfully submitted,

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APPENDIX TO THE BRIEF OF RESERVE NATIONAL INSURANCE COMPANY IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

SUPREME COURT OF ALABAMA

OCTOBER TERM 1992-93

1911098

Reserve National Insurance Company

v.

Ray Crowell and Myrtle Crowell

1911099

Phillip Bailey

v.

Ray Crowell and Myrtle Crowell

1911157

Ray Crowell and Myrtle Crowell

v.

Reserve National Insurance Company and Phillip Bailey

Appeals From Montgomery Circuit Court
(CV-90-1863)

(Released Feb. 5, 1993)

SHORES, JUSTICE.

These appeals are from a judgment based on a jury verdict awarding compensatory and punitive damages to Ray and Myrtle Crowell in an insurance fraud action

against Reserve National Insurance Company and Phillip Bailey. Reserve National and Bailey appeal the trial court's denial of their motions for a judgment notwithstanding the verdict and for a new trial. Reserve National appeals, in the alternative, from the trial court's order of remittitur. The Crowells cross-appeal from the order of remittitur. We affirm.

Bailey, a field agent for Reserve National, sold Medicare supplement policies to the Crowells on September 2, 1988. The Reserve National policies were to replace their existing policies held with Liberty National Insurance Company. Bailey told the Crowells that Reserve National offered a policy that was better than their existing coverage with Liberty National, and that, for payment of an extra month's premium, they would receive immediate coverage and a "pre-existing benefits" (PEB) rider, i.e., a policy addendum providing coverage for pre-existing conditions. The Crowells paid Bailey two months' premiums on each policy. Bailey did not indicate on their application that the Crowells were replacing an existing policy.

The evidence at trial showed that an application for a PEB rider with Reserve National must be for a replacement of an existing Medicare supplement policy (MSP), and that Reserve National requires payment of a quarterly premium rather than a monthly premium in order to obtain immediate coverage. Immediate coverage would give an effective date as the date of application, which was September 2, 1988. The reason the Crowells paid an extra month's premium was that Bailey assured them that doing so would give them immediate coverage and the PEB rider.

Jeff Reeves, of Reserve National's home office in Oklahoma City, received the Crowells' application on September 13, 1988. The application showed that the Crowells wanted PEB riders and immediate coverage for pre-existing conditions, but did not indicate that their policies were to be replacement policies. Bailey telephoned Reeves on October 17, 1988, and told him that the Crowells were, in fact, replacing an existing policy. Reeves then told Bailey to finish the paperwork (which should have included MSP replacement forms signed by the Crowells) on the Crowells' application and send it to him in Oklahoma City. However, Bailey never got the Crowells to sign a Medicare supplement replacement form, even though Reeves had earlier written three times to Bailey requesting replacement forms for the Crowells. Reeves issued the policy without a PEB rider and with an effective date of November 3, 1988.

Myrtle Crowell received her new Medicare supplement policy on November 15, 1988, and on that day she telephoned Reserve National's David Harvey. She told him that Phillip Bailey had told her that the effective date on her policy would be the day of application, September 2, 1988, and that she had paid an extra month's premium to receive immediate coverage. Mrs. Crowell also told Harvey that she had had a heart attack and surgery in October, that her old MSP insurance had lapsed, and that she needed coverage from her policy with Reserve National for October. Harvey told her that the extra month's premium waived the six-month waiting period for pre-existing conditions coverage. Mrs. Crowell understood this to mean that she had coverage for pre-existing

conditions and would receive coverage for her October expenses not covered by Medicaid.

Harvey told his supervisor, Juanita Phelps, about Mrs. Crowell's telephone call because, he said, Mrs. Crowell "thought she had coverage and she didn't, which is a new issue, and Mrs. Phelps is over the new issue department." R.T. 248. Reserve National later changed the effective date of Mrs. Crowell's policy to October 3, 1988.

After Ray Crowell had prostate surgery on January 11, 1989, Reserve National denied his claim on the grounds that his prostate condition was a pre-existing condition and that he did not have PEB coverage under his health insurance policy with Reserve National. The hospital filed claims for Mr. Crowell's prostate treatment with Reserve National, which refused to honor the claims.

The Crowells' daughter, Dorothy Ziglar, telephoned Reserve National, at her parents' request, on October 23, 1989. She spoke with David Harvey and told him that when her parents applied for their policies with Bailey they had paid an extra month's premium for a waiver of the six-month waiting period, in order to receive coverage for pre-existing conditions. Harvey told Ziglar that he had no proof that her parents had paid the extra month's premium and told her what information to send him to show that they had paid the extra premium. On October 31, 1989, Harvey received Ziglar's letter containing a

copy of the Crowells' September 2, 1988, receipt signed by Bailey and showing an initial payment of $207.50.[1]

Harvey turned Ziglar's letter over to his supervisor, Mrs. Phelps. No one from Reserve National responded to Ziglar's letter, although the letter was placed in Reserve National's file concerning the Crowells.

The hospital, unable to collect from Reserve National, turned Mr. Crowell's case file over to a collection agency. The Crowells received several collection letters from the credit agency between September and November 1989 about Mr. Crowell's hospital bills.

The Crowells sued Reserve National and Phillip Bailey. The case was submitted to the jury on the Crowells' claim of fraud; the jury rendered a verdict in favor of the Crowells in the amount of $25,000 compensatory damages and $1,000,000 punitive damages.

Reserve National timely filed motions for a new trial, or, in the alternative, for a judgment notwithstanding the verdict, or, alternatively, for a remittitur. The trial court denied the first two motions, but granted a remittitur of $400,000 on the punitive damages award. The Crowells accepted the remittitur of punitive damages from $1,000,000 to $600,000 on March 17, 1992. The trial court

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[1] The Crowells' monthly premium under their Reserve National policies totalled $106.80. The $207.50 initially collected by Bailey from the Crowells represented a $15.00 registration fee plus two monthly premiums of $96.25. Bailey originally told the Crowells that their monthly premiums would be $96.25 because he forgot to add an additional $10.55 for the cost of a rider.

issued an amended judgment for $625,000 in favor of the Crowells on March 30, 1992.

Reserve National and Bailey appeal the trial court's denial of their motions for a judgment notwithstanding the verdict and for a new trial. Reserve National appeals, in the alternative, from the trial court's order of remittitur, contending that it was an insufficient reduction in the amount of punitive damages. The Crowells cross-appeal from the order of remittitur.

The parties raise four broad issues on appeal: Whether the award of punitive damages was appropriate in this case; whether the judgment, as amended, was sufficient; whether evidence of bias was properly admitted against Reserve National; and whether the trial court erred in its charge to the jury. No party challenges the constitutionality of the punitive damages statute, Article 2 of Chapter 11, Title 6, Code of Alabama 1975.

I.

The defendants contend that the award of punitive damages was not supported by the evidence, because, they allege, Bailey did not know that his representations to the Crowells were false when he led them to believe that they would receive immediate coverage for pre-existing conditions by paying two monthly premiums when they applied for MSP insurance. Section 6-11-20(a), Ala. Code 1975. provides:

> "Punitive damages may not be awarded in any civil action . . . other than in a tort action

> where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff."

The Crowells sued the defendants for damages based on fraud. Fraud that allows punitive damages is defined as "[a]n intentional misrepresentation, deceit, or concealment of a material fact the concealing party had a duty to disclose, which was gross, oppressive or malicious and committed with the intention on the part of the defendant of thereby depriving a person or entity of property or legal rights or otherwise causing injury." § 6-11-20(b)(1). Clear and convincing evidence represents

> "Evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt."

§ 6-11-20(b)(4).

The jury was instructed on these requirements for the imposition of punitive damages. Whether the defendants intended to deceive the Crowells was a question of fact for the jury to decide. *Old Southern Life Insurance Co. v. Woodall,* 326 So.2d 726, 729 (Ala. 1976). Although there was conflicting evidence on the matter, there was also sufficient evidence for a jury to determine that Bailey and Reserve National intended to deceive the Crowells into believing that they had paid for immediate coverage for

pre-existing conditions. The evidence was undisputed that the Crowells told Bailey about Ray Crowell's prostate condition before he sold them policies to replace their existing policies with Liberty National. Bailey told the Crowells that they would receive better coverage than they had under their old policy, yet admitted at trial that their Reserve National policy offered the same coverage as the one it was replacing, even though the monthly premiums under the Reserve National policy were approximately $20 more. Reserve National knew that Bailey had collected an extra month's premium from the Crowells and that the Crowells believed that this payment provided them with more coverage than they actually received when Reserve National issued the policies without a PEB rider and with an effective date of November 3, 1988, which was two months later than the date of their initial payment on September 2, 1988.

A jury's verdict is presumed to be correct "where there is some [clear and convincing] evidence, or a reasonable inference therefrom, to support the verdict, and . . . this presumption is strengthened when the trial court denies a motion for a new trial." *Thompson v. Cooper*, 551 So.2d 1030, 1031 (Ala. 1989). Although the trial court ordered a remittitur of the $1,000,000 verdict, that court's final judgment indicated that punitive damages were warranted against the defendants, albeit in an amount less than that awarded by the jury.

In order to reverse the judgment of the trial court, this Court "must be convinced that the verdict and judgment are contrary to the preponderance of credible evidence and are, therefore, palpably wrong and manifestly unjust." *Mobile Dodge, Inc., v. Waters*, 404 So.2d 26, 27

(Ala. 1981). Because there was sufficient credible evidence for a jury to award punitive damages against both defendants pursuant to § 6-11-20, we conclude that the award of punitive damages in this case was appropriate.

Reserve National contends that the award of punitive damages violated its due process rights because the amount of the award was over 600 times the amount of the Crowells' out-of-pocket expenses. However, "the essential purpose of punitive damages would be thwarted if we required that they conform to any mathematical equation." *Associates Financial Services Co. v. Barbour*, 592 So. 2d 191, 199 (Ala. 1991). Therefore, Reserve National's contention that the award of punitive damages violates its constitutional rights is without merit in this case. *See Barbour* and cases cited therein.

II.

We now must address the sufficiency of the judgment as amended. The jury returned a verdict of $1,000,000 in punitive damages to the Crowells. The trial court, following the directives of this Court in *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989), and *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), determined that the award of punitive damages was excessive, and it ordered a remittitur of $400,000. The Crowells accepted the remittitur, and the court entered an amended judgment of $600,000 in punitive damages and $25,000 in compensatory damages. The amended judgment indicated that the Crowells were entitled to recover only up to $250,000 in punitive

damages from Phillip Bailey, pursuant to Alabama Code 1975, § 6-11-21.[2]

Reserve National contends on appeal that the reduced punitive damages award of $600,000 is still excessive, and that, by applying the statutory damages cap of $250,000 to Bailey and not to Reserve National, the trial court is violating the rule against apportionment of damages between joint tort-feasors. *See Buchanan v. Collier,* 555 So.2d 134, 136 (Ala. 1989). We disagree.

The punitive damages cap under § 6-11-21 does not represent an apportionment of damages among joint tort-feasors. The purpose of punitive damages is to deter wrongful conduct and to punish those who may profit by such conduct. *See Central Alabama Elec. Coop. v. Tapley,* 546 So.2d 371, 377 (Ala. 1989). The statutory cap serves to limit the amount of punitive damages that a defendant can be held liable for, unless the defendant falls within the exceptions to the imposition of that cap.[3] These exceptions address wrongful conduct that is, by its very

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[2] We again emphasize that the constitutionality of this statute is not challenged, and we assume for the present discussion that the statute is valid.

[3] Section 6-11-21 provides:

"An award of punitive damages shall not exceed $250,000.00, unless it is based upon one or more of the following:

"(1) A pattern or practice of intentional wrongful conduct, even though the damage or injury was inflicted only on the plaintiff; or,

"(2) Conduct involving actual malice other than fraud or bad faith not a part of a pattern or practice; or,

"(3) Libel, slander or defamation."

nature, so egregious that a punitive damages award beyond the statutory cap is warranted, if the facts of the case so indicate, in order to adequately punish and deter such conduct.

The trial court found that the actions of Reserve National fell within the "pattern or practice" exception of § 6-11-21(1),[4] but that none of Bailey's conduct excepted him from the $250,000 punitive damages cap. Clearly, the legislature did not intend for the statutory cap to fall by the wayside in the situation of joint tort-feasors, when one joint tort-feasor fits beneath the statutory cap and the other does not. To so hold would make a mockery of the law, by allowing a joint tort-feasor to escape punitive damages in excess of the cap merely because another tort-feasor is less culpable, even when the jury and the trial court have determined, based on the facts of the case, that the more culpable tort-feasor is guilty of conduct that deserves greater punishment and that requires a higher degree of deterrence than that appropriate for a less culpable tort-feasor.

A law will not be interpreted in such a way as to make it meaningless. In the situation where joint tort-feasors act with differing degrees of culpability, so that one tort-feasor's conduct falls within the statutory exception to the cap on punitive damages under § 6-11-21 and

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[4] Specifically, the trial court in its order found a pattern or practice of intentional wrongful misconduct by Reserve National and its agents based on, among other evidence, testimony of two other witnesses that, on earlier occasions, "agents of Reserve National misrepresented the truth to them regarding pre-existing condition coverage." C.R. 445.

the other's does not, then the statutory cap may apply to one tort-feasor and not to the other, without violating the rule against apportionment between joint tort-feasors.

We now address, in tandem with the following issue, the contention that the judgment was excessive even after the remittitur.

On cross-appeal, the Crowells request this Court to reinstate the jury's $1,000,000 punitive damages award. Absent a finding that the remittitur was not supported by the directives of *Green Oil* and *Hammond, supra,* we will not do so. We have carefully examined the trial court's analysis of the amount of punitive damages, and we conclude that the court properly ordered a remittitur of $400,000 under the guidelines of *Green Oil* and *Hammond.* In setting aside the $1,000,000 verdict as flawed, the trial court recognized the fundamental, constitutionally guaranteed right to a trial by jury. Ala. Const. of 1901, art. I, § 11. Based upon the *Hammond* and *Green Oil* directives, a thorough review of the facts of this case, and a review of the amount of punitive damages awarded in other cases, the trial court determined that the jury's verdict went beyond the amount necessary to accomplish society's goal of punishment and deterrence, and it ordered a remittitur of $400,000. We cannot say that the trial court abused its discretion in so doing, and, therefore, we affirm the order of remittitur.

III.

The defendants contend that the trial court erred in admitting evidence that Reserve National paid the costs

of Bailey's defense. The court refused to admit the evidence to show that Reserve National ratified Bailey's conduct, but admitted it as evidence of bias, to show that Bailey, who was no longer employed by Reserve National, might be influenced to testify favorably for Reserve National by its payment of the costs of his defense.

A trial court has discretion to admit evidence that will show the bias, prejudice, or interest of a witness. *Osborne v. Cobb*, 410 So.2d 396, 398 (Ala. 1982). This Court has specifically held that a connection between a witness and an insurance company may be used to show a tendency of bias on the part of the witness. *Hinton & Sons v. Strahan*, 266 Ala. 307, 313, 96 So.2d 426, 431 (Ala. 1957), and cases cited therein. Furthermore, a party may show bias of its own witness, when that witness is called as an adverse witness.

Bailey was called by the Crowells as an adverse witness. The fact that Reserve National paid Bailey's defense costs is a matter the jury should be able to consider in determining the credibility of Bailey as a witness, much as a jury can consider whether the financial gain an expert witness may receive from testifying at trial could bias that witness's testimony. *See Plitt v. Griggs*, 585 So.2d 1317, 1322-23 (Ala. 1991). Evidence that a principal paid the court costs of its agent or former agent who is a co-defendant in the same case should be admissible at the discretion of the trial court as tending to show bias on the part of the agent in favor of the principal. See *Price v. Cox*, 242 Ala. 568, 570, 7 So.2d 288, 290 (1942) (evidence that one partner paid co-defendant partner's attorney fees in unrelated case admissible to show

bias). Because there is no indication in the record before us that the trial court abused its discretion in admitting the evidence, we cannot conclude that the trial court erred in admitting evidence that Reserve National paid the costs of Bailey's defense.

IV.

The final issue before us is whether the trial court erred in submitting the claim of mental anguish to the jury and in refusing to give Reserve National's proposed jury charges number 24 and number 32. Rule 51, A. R. Civ. P., as it concerns appeals of refused jury charges, states:

> "The refusal of a requested, written instruction, although a correct statement of the law, shall not be cause for reversal on appeal if it appears that the same rule of law was substantially and fairly given to the jury in the court's oral charge or in charges given at the request of the parties. No party may assign as error the giving or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge unless he objects thereto before the jury retires to consider its verdict, stating the matter to which he objects and the grounds of his objection."

Reserve National did not object to the court's refusal of charge number 32, and, thus, as to that requested charge, did not preserve this issue for appeal. The trial court did not err in refusing Reserve National's charge number 24, because the rule of law set forth in the requested charge was given to the jury when the court, in

charging the jury, read Alabama Pattern Jury Instruction 11.03 and Ala. Code 1975, § 6-11-20, to the jury. A. R. Civ. P. 51.

The claim of mental anguish was properly submitted to the jury. Reserve National contends that *Allen v. Walker*, 569 So.2d 350 (Ala. 1990), stands for the position that a plaintiff "cannot recover [for] mental anguish or emotional distress resulting from negligence." Reserve National's brief at 33. Its interpretation of the language in *Allen* is too broad.

Allen involved an action containing claims of both negligent infliction of emotional distress and intentional infliction of emotional distress. The negligent infliction claim was disposed of on a motion for summary judgment. This Court affirmed the summary judgment as to the negligence claim, stating that "there is no cause of action for the *negligent* infliction of emotional distress." *Id.* at 352 (emphasis in original).

However, the case before us involves a claim of fraud, and it is not based on a cause of action for infliction of emotional distress, whether negligent or intentional. Damages for mental distress may be awarded in a case of willful fraud. *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So.2d 537, 540 (Ala. 1989), *affirmed*, 499 U.S. ___, 111 S. Ct.1032 (1991). As *Haslip* indicates, a fraud may be intentionally perpetrated, and that fraud, being willful fraud, could result in emotional distress to the victims. In such a case, damages for the mental distress caused by the willful fraud may be awarded by the jury, whether the actual infliction of the emotional distress by the defendant was

intentional or reckless. See *Associated Financial Services*, supra.

Punitive damages may be awarded for willful or intentional fraud, pursuant to § 6-11-20. Because the jury awarded punitive damages against Reserve National and Bailey, we must conclude that the jury determined that the fraud was willful on the part of both defendants. For the above reasons, and because damages for mental distress may be awarded in the case of willful fraud, the trial court properly submitted the claim of mental anguish to the jury.

In view of the record, and in light of the foregoing reasoning, we conclude that the judgment of the trial court, as to all issues raised by these appeals, including the remittitur of the punitive damages award, is due to be affirmed.

1911098 – AFFIRMED.

1911099 – AFFIRMED.

1911157 – AFFIRMED.

Maddox, Almon, and Houston, JJ., concur.

Kennedy, J., concurs in the result.

APPENDIX B

THE STATE OF ALABAMA - - - - JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
March 19, 1993

1911098

Reserve National Insurance Company v. Ray Crowell and Myrtle Crowell (Montgomery: CV-90-1863)

1911099

Phillip Bailey v. Ray Crowell and Myrtle Crowell (Montgomery: CV-90-1863)

1911157

Ray Crowell and Myrtle Crowell v. Reserve National Insurance Company and Phillip Bailey (Montgomery: CV-90-1863)

NOTICE

The applications for rehearing filed in these cases are overruled. No opinion written on rehearing.

SHORES, J. – MADDOX, ALMON, HOUSTON & KENNEDY, JJ., CONCUR.

APPENDIX C

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

RAY CROWELL and MYRTLE CROWELL,	)	
Plaintiffs,	)	CASE NO. CV-90-1863
VS.	)	
PHILLIP BAILEY and RESERVE NATIONAL INSURANCE CO.,	)	
Defendants.	)	

ORDER

This case is before the Court at this time on separate Motions for Judgments Notwithstanding the Verdict, or In the Alternative for New Trials, or In the Alternative for Remittitur filed respectively on behalf of Defendants, Phillip Bailey and Reserve National Insurance Company. On this submission, this Court has reviewed portions of the transcript of testimony, the Court's oral charge, and the briefs and argument of counsel.

The case involves allegations of legal fraud against both defendants stemming from alleged misrepresentations with regard to a Medicare Supplement medical insurance policy. The jury returned a verdict of $25,000 Compensatory and $1,000,000 Punitive.[1]

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[1] "We, the Jury, find the issues in favor of the Plaintiffs, Ray Crowell and Myrtle Crowell, and against both defendants, Phillip Bailey and Reserve National Insurance Co., and assess their damages as follows:

The evidence at trial was that Phillip Bailey went to the home of Ray and Myrtle Crowell on September 2, 1988 with regard to the sale of Medicare Supplement medical insurance. At that time, the Crowells already had this coverage with Liberty National Insurance Company. Mr. Bailey admitted at trial that at the time he sold the Reserve National Insurance policies to the Crowells, he knew that they already had the Liberty National Medicare Supplement policies and that he was told by the Crowells that they would be replacing these policies. Mr. Bailey still wrote on the application that they were not replacing coverage. Bailey admitted that he told the Crowells that upon payment of prescribed premiums they would have immediate coverage for any and all pre-existing conditions. The Crowells, in reliance on the representations made by Bailey, bought the Reserve National policy and thereafter dropped the Liberty National policies. After this, Reserve National told the Crowells that instead of a monthly premium of $96.25 as originally stated, the correct monthly premium would be $106.80.

Even though Bailey knew the Crowells had Liberty National Medicare Supplement Policies that were replaced by the Reserve National coverage, he checked

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$25,000 Compensatory
$1,000,000 Punitive
$1,025,000 TOTAL"

Note: The Court submitted alternate verdict forms to the Jury in accord with Section 37.05, Alabama Pattern Jury Instructions. June 1990, Supplement. See explanation as contained in Court's oral charge.

the question regarding "Policies In Force and Replacement – No". Mr. Bailey chose not to write on the application anything about Ray Crowell's pre-existing prostate condition even though the evidence was without dispute that the Crowells informed him of this pre-existing condition. Mr. Bailey did not obtain an executed replacement form even though he knew the Crowells were replacing their Liberty National Medical Supplement Policies when they purchased the Reserve National Medicare Supplement policy.

The Crowells permitted their Liberty National policies to lapse by choosing not to pay the premium. These Liberty National policies lapsed on October 1, 1988.

Ray Crowell had prostate surgery during a hospitalization that continued from January 11 through January 14, 1989. Upon claims being filed by Ray Crowell, Reserve National sent two (2) denial letters to Ray and Myrtle Crowell denying Ray Crowell's claims for the prostate operation because of the pre-existing prostate condition. These letters were dated May 8 and May 17, 1989. It was without dispute that Phillip Bailey failed to include in the Crowell's original application for the Reserve National policy anything about Ray Crowell's prostate condition, even though he had knowledge of this.

The Defendants claim that a new trial should be granted or a judgment entered notwithstanding the verdict or a remittitur granted in that the Court erred in submitting the issue of punitive damages to the jury; in submitting the claim of mental anguish to the jury; and, in allowing Plaintiffs to introduce evidence of other

alleged frauds involving other insureds. Defendants further contend that the court erred in permitting Plaintiffs to introduce evidence that Reserve National was paying for the legal defense and hotel accommodations for Phillip Bailey and further that the award of $1,000,000 in punitive damages under the facts of this case is excessive and should be subject to the limitation provision of Title 6-11-21,[2] *Code of Alabama*, 1975. The Defendants further contend that the award of punitive damages under the current posture of Alabama Law is violative of the Constitution of the State of Alabama and the Constitution of the United States.

Upon review of the Record and upon the Court's own recollection, this Court finds that there was ample evidence upon which the jury could have found the Defendants liable for willful, reckless, fraudulent misrepresentations within the provisions of Title 6-5-101, et seq. *Code of Alabama*, 1975. The Court thoroughly charged the jury from the Alabama Pattern Jury Instructions 18.00 et seq. and in accord with the statutory law of the State of Alabama pertaining to fraudulent conduct. There was substantial evidence as to willful, reckless fraud by both of the Defendants as well as deceit and suppression of the truth.

The issue of mental anguish was properly submitted to the jury. There was ample evidence from both Ray and Myrtle Crowell that they lost sleep, were nervous, argued more than they had in the past, suffered anxiety and

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[2] Defendants contend that the limitation should be applicable to both defendants or a new trial granted, since in Alabama damages cannot be apportioned between joint tortfeasors.

distress over the nonpayment of their medical bills as a result of Reserve National's fraud, they received dun letters from several medical providers and that this had worried them considerably. The Court gave detailed instructions with regard to mental anguish as a part of compensatory damages. See *Holcombe v. Whitaker*, 294 Ala. 430, at p. 433-434; and *Fidelity & Casualty Co. v. J. D. Pittman Tractor Co.*, 244 Ala. 354, at p. 358 (Ala. 1943). Specifically, the Court charged the jury as follows:

> "You are entitled to consider medical bills not paid, you are entitled to consider the law that says the general measure of recovery for fraud includes all damages within the contemplation of the parties or which are the necessary and natural and proximate consequence of the wrong. It's up to you all to determine what was in the contemplation of these parties, including if you are reasonably satisfied that mental anguish, worry, anxiety was in the contemplation of these parties, with that standard, that would be up to you, and if you are reasonably satisfied that mental anguish, worry, anxiety was in the contemplation of these parties, that they were the natural and consequences of this alleged wrong, then you would be entitled to consider that in your compensatory damages, to reasonably and fairly pay somebody for what they have lost or what they have been through.

Pursuant to § 6-11-21, *Code of Alabama*, 1975, an award of punitive damages cannot exceed $250,000.00 unless the award is predicated on one or more of the following:

> "(1) A pattern or practice of intentional wrongful conduct, even though the damage or

injury was inflicted only on the plaintiff; or,

(2) Conduct involving actual malice other than fraud or bad faith not a part of a pattern or practice; or,

(3) Libel, slander or defamation. (Acts 1987, No. 87-185, p. 251, §2.)"

The actionable misrepresentations by Phillip Bailey all occurred on September 2, 1988. These misrepresentations were made at the Crowells' house during the initial meeting between Phillip Bailey and the Crowells, at which time the application for insurance was filled out. The misrepresentations of Bailey each involved legal fraud. The evidence insofar as the misrepresentations of Bailey are concerned does not establish a continuous pattern or practice of "temporally separate" conduct within the provisions of §6-11-21. *Youngblood v. Lawyers Title Ins. Corp.*, 746 F.Supp. 71 (S.D. Ala. 1989). The Court does not find that the conduct of Bailey falls within any of the statutory exceptions to the $250,000.00 limitation.

There was evidence that the corporation, through employees and agents other than Bailey, did in fact follow a pattern or practice of intentional wrongful conduct with regard to the Plaintiffs and to other insureds insofar as the handling of pre-existing conditions. Specifically, on November 15, 1988, Myrtle Crowell spoke with David Harvey of Policy Service at the Home Office of the Company. Harvey restated to Mrs. Crowell the earlier misrepresentation of Bailey:

"The extra month's premium of $96.25 was for pre-existing benefit coverage." (See Plaintiffs' Exhibit 10).

The evidence establishes that this misrepresentation was made to Ms. Crowell at a time when the Home Office file contained information and facts indicating that the truth had not been told to the Crowells as to the policies they had purchased.

On October 23, 1989, Dorothy Zeigler, the Crowells' daughter, had a conversation with David Harvey regarding the denial of the claims. Dorothy Zeigler specifically told Mr. Harvey at that time of the misrepresentation made to her mother and father by Agent Bailey. Mr. Harvey told her to put this information in a letter and attach the applicable documents. On October 31, 1989, Reserve National received the letter from Dorothy Zeigler which restates the misrepresentation made to the Crowells by Agent Bailey, and specifically, the misrepresentation regarding pre-existing conditions. Reserve National did not respond to this letter. Thereafter, on February 23, 1990, Agent Phillip Bailey was relicensed and appointed by Reserve National to represent the Company in the selling of policies throughout the State of Alabama.

The evidence with regard to other insureds, Mrs. Paulk and Mrs. Mock, show that other agents of Reserve National misrepresented the truth to them regarding pre-existing condition coverage. [As to the admissibility of this evidence, see *Winn Dixie Montgomery, Inc. v. Henderson*, 395 So.2d 475 (Ala. 1981)].

The Court thus finds that the misconduct of Reserve National does, in fact, fall within the "pattern or practice of intentional wrongful conduct" exception, to the $250,000.00 limitation of punitive damages, i.e.

§6-11-21(1). The Court further finds that under the facts and circumstances of this case there was evidence of wrongful conduct of other agents of Reserve National in addition to Agent Bailey, which does show a "pattern or practice of intentional wrongful conduct"; thus, the legislatively imposed limitation on the award is not applicable here to the corporation.

This Court recognizes that historically the law in Alabama has been that damages cannot be apportioned between joint tortfeasors. However, in 1987 the legislature enacted the $250,000.00 limitation when one or more specified conditions are shown. Applying this statutory limitation to the facts of the instant case, this Court is of the opinion and finds that the application of the legislatively imposed limitation on the award against Agent Bailey is required. The "lump sum verdict" will stand subject to the remittitur hereinafter imposed. However, as to Agent Bailey, the Plaintiffs are entitled to collect up to $250,000.00 pursuant to the provisions of §6-11-21. No such statutory limitation applies to Reserve National.

The position of Reserve National throughout this case has been that Mr. Bailey was mistaken in his representations to the Crowells as to pre-existing condition coverage. The Company has consistently insisted that Bailey's conduct did not show intentional or willful fraud, deceit, or suppression of truth. The tendencies of Agent Bailey's testimony was consistent with the defense of Reserve National. Plaintiffs, over the Defendants' objections, were permitted to show that the Defendant, Reserve National, was paying the legal defense for Bailey and for his hotel accommodations during trial. The Court admitted this testimony on the limited issue as to bias on

the part of the witness. The Court gave the jury the following detailed limiting instruction:

> "Ladies and gentlemen, this is going to be admitted on a limited basis as far as payment, supplying this witness, this party with legal counsel, is going to be admitted before you for the limited purpose for you to use in whatever way that you deem appropriate to use it, as far as this witness's credibility. It's not admitted as substantive evidence, but it's admitted for whatever weight you want to give, if any, to the credibility of this witness, and whether he has any reason because of this supplying, alleged supplying of legal representation, whether that affords any basis to this witness to slant his testimony this way or that way. For that limited purpose, not for the substantive purpose, but for evidence of credibility or what the law calls bias, it's admitted for that limited purpose, for whatever weight if any that you all want to give to it."

An outside the presence of the jury hearing was held as to the admissibility of this evidence. This Court stated on the Record to counsel from *"McElroy's Alabama Evidence"* the following:

> "Whenever the trial court is faced with the admissibility of a question asked to elicit bias or the introduction of evidence showing bias, the better course seems to be that the court should rule for admission. A study of the decisions, for example, shows that nearly all reversals of trial rulings on offers of proof of a witness' bias have resulted from the rejection, rather than the reception, of the offered proof. That's one forty-nine point oh one, paren three of *McElroy*." See

McElroy's Alabama Evidence, §149.01 at Pg. 310, (3rd Ed. 1977), and Cases Collected *Alabama Digest*: Witnesses Key Number 363 et seq.

The common thread throughout all of the cases seems to be that the Court is afforded great latitude in determining the admissibility of evidence on the issue of bias. The Court finds that the evidence of Reserve National paying Bailey's legal expenses and for his hotel accommodations during trial was property [sic] admitted on the question of bias and as explained to the jury.

The law of punitive damages was thoroughly explained to the jury by virtue of the latest supplement to the *Alabama Pattern Jury Instructions* by reading in its entirety Alabama Pattern Jury Instruction 11.03 (Amended) – Punitive Damages. The Court also read §6-11-20, *Code of Alabama*, 1975, to the jury in its entirety. The Court clearly explained to the jury that punitive damages may not be awarded unless the plaintiff proves "by clear and convincing evidence" that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff' The definitions of fraud, wantonness and malice were given both from Alabama Pattern Jury Instruction 11.03 (Amended) and again from §6-11-20.

The Court explained the dual purpose of punitive damages, . . . by stating:

> " . . . the purpose of awarding punitive or exemplary damages, punitive or exemplary, to punish and to make an example of someone, is to allow a money recovery to the plaintiff by way of punishment of the defendant, and for the added purpose of protecting the public by deterring

> the defendant and others from doing such wrong in the future."

The Court charged the jury as to the definition of "clear and convincing" both from Amended 11.03 of the *Alabama Pattern Jury Instructions* and from §6-11-20, Code of Alabama, 1975.

As the Court noted in writing on the Defendants' requested charges with regard to punitive damages, all of these charges were thoroughly and completely covered by reading the entire Alabama Pattern Jury Instruction charge, that is, Amended 11.03, and also by reading §6-11-20 in its entirety.

The Court will now review the issue of whether the punitive damages awarded herein were excessive. In doing so, the Court will follow the directives of the Supreme Court of Alabama as outlined in *Green Oil Company v. Hornsby,* 539 So.2d 218 (Ala. 1989), and *Hammond v. City of Gadsden,* 493 So.2d 1374 (Ala. 1986).

1. *THE HARM LIKELY TO OCCUR AND THE HARM THAT ACTUALLY OCCURRED.*

> This case involved misrepresentations with regard to Medicare Supplement medical insurance. The policyholders were elderly and subject to being misled. It is entirely foreseeable that elderly persons would be involved with Medicare Supplement insurance and that such older people could be easily misled. The Court finds that the harm to insureds, such as shown by the facts of this case, is grievous and, therefore, damages should be high.

2. *THE DEGREE OF REPREHENSIBILITY OF DEFENDANTS' CONDUCT.*

The evidence shows that Defendant Bailey told Mr. Crowell that he was covered for his pre-existing prostate condition. The required premiums were paid. The Company continued to conceal the truth and to misrepresent the facts of no coverage to the Plaintiffs. The Defendant, Reserve National, had engaged in similar misrepresentations with regard to pre-existing conditions in the past.

3. *PROFIT.*

It was without dispute that additional premiums were charged for coverage that the Plaintiffs did not receive. Defendants charged and received these premiums but refused to pay benefits. The Court notes that ultimately Reserve National did pay the amount of Mr. Crowell's hospital and medical bills into Court.

4. *FINANCIAL POSITION OF THE PARTIES.*

The Defendant, Reserve National, did not take a position in Court that the award of $1,000,000 would place them in receivership or bankruptcy. Mr. Bailey did, however, take the position that the amount of $1,000,000 would ruin him. The Court notes that as hereinabove stated the award against Mr. Bailey is subject to the limitation imposed by §6-11-21.

5. *COST OF LITIGATION.*

The Court is aware that Plaintiffs incurred a great deal of expense in preparing this case. The Court takes judicial note that litigation of this nature is costly with depositions being taken throughout the country. Accordingly, the Court

finds that the verdict should be high enough to enable Plaintiffs, such as these, and their attorneys, to pursue this type of case.

6. *CRIMINAL SANCTIONS.*

There has been no evidence produced that criminal sanctions have been imposed upon either Reserve National or Agent Bailey for their conduct in connection with this matter. There were two other settlements in cases similar to this and as pointed out by the Defendants; the case of *Paulk v. Reserve National* settled for $14,000.00 and *Mock v. Reserve National* settled for $18,000.00. Neither of these cases show that the Company has been subjected to substantial punitive damages for exemplary purposes or for punishment.

7. *CIVIL ACTIONS.*

The aforementioned cases of *Paulk* and *Mock* are the only other civil actions that have been introduced here against Reserve National. Again, neither of these settlement awards evidence exemplary or punitive damages such as would be justified by the enormity of the wrong with regard to misrepresentations of coverage in regard to pre-existing conditions.

Our Supreme Court has repeatedly held that punitive damages need bear no particular relationship to the amount of compensatory or out-of-pocket expenses. In its *Hammond* order, the trial Court followed this basic guideline:

> "Punitive damages should not exceed an amount necessary to accomplish society's goals of punishment and deterrence, but the degree of punishment necessary to achieve those goals changes with each case." *Central Alabama Electric*

Cooperative v. Tapley, 546 So.2d 371, 377 (Ala. 1989).

From reviewing many cases on the subject of alleged excessiveness in punitive damages, the Court is reminded that a trial by jury is a fundamental, constitutionally guaranteed right, Art. I, §11, Const. of 1901, and, therefore a jury verdict may not be set aside unless the verdict is flawed, thereby losing its protection. In *Hammond*, the Court held that a jury verdict may be flawed in two ways.

> "First, it may include or exclude a sum which is clearly recoverable or not as a matter of law, or which is totally unsupported by the evidence, where there is an exact standard or rule of law that makes the damages legally and mathematically ascertainable at a precise figure. In these situations, a trial court may, and should, reduce or increase the amount of the verdict to reflect the amount to which the parties are entitled as a matter of law. Second, a jury verdict may be flawed because it results, not from the evidence and applicable law, but from bias, passion, prejudice, corruption, or other improper motive."

The Supreme Court recently held in ordering a remittitur in the case of *General Motors Corporation v. Helen Lewis Johnston*, January 24, 1992, as follows:

> "The presumption of correctness of a jury verdict can be overcome only by a *clear* showing that the amount of the award is excessive." *Green Oil Co.*, 539 So.2d 218 (emphasis added). "It is well understood that in considering the adequacy or excessiveness of a verdict, each case must be determined on its own facts, and that neither the trial court, nor this Court, may

> substitute its judgment for that of the jury." *Green Oil Co.*, 539 So.2d at 222, citing *City Bank of Alabama v. Eskridge*, 521 So.2d 931 (Ala. 1988); *Hammond*, 493 So.2d 1374.

The Supreme Court in *Green Oil Co. v. Hornsby*, supra, held:

> "Bearing in mind that punitive damages must not exceed an amount that will accomplish society's goals of punishment and deterrence, *it is possible for a jury to hear the evidence in the case, make findings of fact, correctly apply the law, and still, albeit unwittingly, assess damages that bear no reasonable relationship to the accomplishment of those goals.*" (Emphasis Added).

Based upon a thorough review of this case, and of the amount of punitive damages in other cases, this Court is of the opinion that the punitive damages award in this case is excessive and the Court orders a remittitur of $400,000. Even though the Court determines a remittitur to be necessary, the Court is of the opinion and finds that the evidence supports a punitive damages award of $600,000. The determination of excessiveness is based upon applying the law of *Hammond* and *Green Oil* that punitive damages should not exceed an amount necessary to accomplish society's goal of punishment and deterrence for the facts and circumstances of this case. This Court finds that an award of $600,000 will accomplish society's goals of punishment and deterrence and is the degree of punishment necessary to achieve the goal set forth in *Hammond* and *Green Oil Co.*, supra.

Finally, the Defendants contend in the motions *sub judice* that an award of punitive damages under the current posture of Alabama Law is violative of the Constitution of the State of Alabama and the Constitution of the United States. This issue was decided contrary to the Defendants' position in the case of *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

Accordingly, it is considered ORDERED, ADJUDGED and DECREED by the Court as follows:

1. The Motions of both Defendants are overruled as to the $25,000 award of compensatory damages.

2. The Plaintiffs are entitled to recover up to $250,000 in punitive damages from the Defendant, Phillip Bailey, in accord with the provisions of §6-11-21, *Code of Alabama*, 1975.

3. The Motion of Reserve National Insurance Company for a New Trial is overruled subject to the acceptance by the Plaintiffs of a remittitur of $400,000 within twenty-eight (28) days from the date of this Order.

4. The Motions in all other respects be, and the same are hereby overruled.

DONE this 4th day of March, 1992.

/s/ Joseph D. Phelps
JOSEPH D. PHELPS,
CIRCUIT JUDGE

cc: Steve Schmitt
Clay Hornsby
Phil Butler
Jim Garrett

APPENDIX D

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

AT MONTGOMERY, ALABAMA

RAY CROWELL and MYRTLE CROWELL,

PLAINTIFFS

CV-90-1863-PH

VS

PHILLIP BAILEY and RESERVE NATIONAL INSURANCE COMPANY,

DEFENDANTS

AMENDED JUDGMENT

The Court has been informed that the Plaintiffs, Ray Crowell and Myrtle Crowell, have accepted the Court's remittitur of punitive damages from $1,000,000.00 to $600,000.00 as set forth in the Court's "Order" dated March 4, 1992.

It is therefore ORDERED, ADJUDGED and DECREED as follows:

1. Judgment is hereby entered in favor of the Plaintiffs, Ray Crowell and Myrtle Crowell, against the Defendants, Phillip Bailey and Reserve National Insurance Company, in the total sum of $625,000.00 for which let execution issue. Of this total judgment, $25,000.00 is compensatory damages and $600,000.00 is punitive damages. Judgment is further entered in favor of Ray Crowell and Myrtle Crowell and against Defendants Phillip Bailey and

Reserve National Insurance Company for costs of Court, for which let execution issue.

2. The judgment entered by this Court on or about October 25, 1991 filed in the Clerk's Office on said date is hereby amended consistent with paragraph 1 above.

3. Defendants Phillip Bailey and Reserve National Insurance Company's Motions for New Trial and JNOV are hereby denied consistent with the "Order" signed by the Court on March 4, 1992. All other motions in all other respects filed by both Defendants are hereby overruled.

4. The Plaintiffs, Ray Crowell and Myrtle Crowell, are entitled to recover up to $250,000.00 in punitive damages from the Defendant, Phillip Bailey, in accord with the provisions of §6-11-21, Code of Alabama, 1975.

Done this 30th day of March, 1992.

/s/ Joseph D. Phelps
JOSEPH D. PHELPS,
Circuit Judge

APPENDIX E

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

RAY CROWELL and MYRTLE CROWELL,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	NO. CV-90-1863-PH
PHILLIP BAILEY and RESERVE NATIONAL INSURANCE COMPANY,	)	
Defendants.	)	

ANSWER

Comes now Defendant Reserve National Insurance Company and for response to the complaint heretofore filed says as follows:

* * *

EIGHTH DEFENSE

Defendant Reserve National Insurance Company contends that the Plaintiffs' claim for punitive damages violates this Defendant's rights of Equal Protection and Due Process of Law under the Alabama Constitution and the Constitution of the United States of America.

/s/ Philip H. Butler
PHILIP H. BUTLER
Attorney for Defendant
Reserve National
Insurance Co.

APPENDIX F

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, ALABAMA

RAY CROWELL and MYRTLE CROWELL	)	
Plaintiffs,	)	CV-90-1863-PH
vs.	)	
PHILLIP BAILEY and RESERVE NATIONAL INSURANCE CO.,	)	
Defendants.	)	

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR A NEW TRIAL, OR IN THE ALTERNATIVE, MOTION FOR FOR [sic] REMITTITUR FILED ON BEHALF OF DEFENDANT RESERVE NATIONAL INSURANCE COMPANY

Comes now Defendant Reserve National Insurance Company, by and through its counsel of record, and moves the Court to set aside the verdict of the jury rendered on, to-wit: October 25, 1991, and the judgment of the Court entered upon such verdict. This Defendant additionally moves the Court to enter judgment in favor of this Defendant in accordance with its motions for directed verdict, or in the alternative to grant unto this Defendant a new trial, or in the alternative to grant a substantial remittitur. As grounds for said motions, Defendant sets down and assigns the following, separately and severally:

* * *

24. The award of punitive damages to the Plaintiffs in this case is violative of the constitutional safeguards provided to this Defendant under the Constitution of the United States and the State of Alabama.

25. The award of punitive damages in this case is violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 6 of the Constitution of the State of Alabama.

* * *

APPENDIX G

IN THE SUPREME COURT OF ALABAMA

CASE NOS. 1911098, 1911099, 1911157

RESERVE NATIONAL INSURANCE COMPANY
AND
PHILLIP BAILEY,

Appellants/Cross-Appellees

versus

RAY CROWELL AND MYRTLE CROWELL,

Appellees/Cross-Appellants

BRIEF OF APPELLANTS
RESERVE NATIONAL INSURANCE COMPANY

---

* * *

D. THE AWARD OF PUNITIVE DAMAGES, AS REMITTED, VIOLATES RESERVE NATIONAL'S RIGHTS OF DUE PROCESS UNDER THE CONSTITUTION OF THE STATE OF ALABAMA AND THE UNITED STATES CONSTITUTION.

The only standards under Alabama law for the jury to utilize in the assessment of punitive damages are the over-broad and general standards of "enormity of the wrong and the necessity for deterrence". Punitive damages awards by juries against insurance companies have all too often demonstrated the inadequacy of such standards to reasonably protect a defendant in a claim for punitive damages. The assessment of punitive damages is left entirely to the discretion or whim of the jury which is ill-equipped, without sufficient standards, to award a

reasonable and appropriate amount of punitive damages, especially when allowed to receive highly prejudicial evidence containing little or no probative value. The result has often ended in an award of punitive damages that far exceeds the legitimate purpose of punitive damages and this case is a glaring example.

While the United States Supreme Court has addressed the constitutionality of standards for imposing punitive damages under Alabama law in ***Pacific Mutual Life Insurance Co. v. Haslip, supra,*** it is clear from ***Haslip*** that a punitive damage award that is 200 times the out-of-pocket loss is "close to the line" of constitutional impropriety insofar as due process is concerned. ***113 L.Ed.2d at page 23.*** The instant punitive award, even as remitted, is over 685 times the out-of-pocket loss. Clearly, the safeguards the United States Supreme Court in ***Haslip*** recognized to exist in Alabama have not been adequately utilized and applied where the trial court permits more than 3 times that which the United States Supreme Court found to be close to the line of constitutional impropriety.

* * *

APPENDIX H

IN THE SUPREME COURT OF ALABAMA

RESERVE NATIONAL INSURANCE COMPANY AND PHILLIP BAILEY,	*	
Appellants/Cross-Appellees,	*	**CASE NO. 1911098**
v.	*	
RAY CROWELL AND MYRTLE CROWELL,	*	
Appellees/Cross-Appellants.	*	

APPLICATION FOR REHEARING

Comes now, Appellant, Reserve National Insurance Company, by and through its counsel of record and applies for rehearing and reconsideration of this Court's opinion dated February 5, 1993 based upon the following grounds:

1. The original opinion is inconsistent with and violative of the directives of the United States Supreme Court in *Pacific Mutual Life Insurance Company v. Haslip*, 111 S.Ct. 1032 (1991).

2. The disparity of the relationship of actual loss to punitive award of approximately 1 to 685 in the instant case violates this Appellants constitutional rights of due process of law.

3. The Court in its original opinion fails to even address the issue of whether the relationship of actual

loss to punitive award violates this Appellants constitutional rights of due process of law.

Respectfully submitted,

/s/ Philip H. Butler
PHILIP H. BUTLER
Attorney for Appellant,
Reserve National
Insurance Company

IN THE SUPREME COURT OF ALABAMA

RESERVE NATIONAL INSURANCE COMPANY AND PHILLIP BAILEY,	*	
Appellants/Cross-Appellees,	*	**CASE NO. 1911098**
vs.	*	
RAY CROWELL AND MYRTLE CROWELL,	*	
Appellees/Cross-Appellants.	*	

BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

Comes now, Appellant, Reserve National Insurance Company, and files this *Brief in Support of its Application for Rehearing* on the issue of whether the appellees' actual loss as compared to the punitive award is so excessive as

to violate this appellant's constitutional rights of due process.

THE RELATIONSHIP BETWEEN ACTUAL LOSS AND PUNITIVE AWARD IS SO DISPARATE AS TO VIOLATE THIS APPELLANT'S CONSTITUTIONAL RIGHTS OF DUE PROCESS OF LAW

The Court in its original opinion rejected, without specifically addressing, Appellant, Reserve National's contention that the punitive award in the instant case is unconstitutionally excessive inasmuch as the relationship between the Plaintiff's actual loss and the punitive award is approximately 1 to 685. Reserve National's position is consistent with that of the United States Supreme Court in *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. ___, 111 S. Ct. 1032, 113 L. Ed. 2d (1991) wherein it found a comparison of actual loss to punitive award of 1 to 200 to be "close to the line" of constitutional impropriety.

At page nine of its original opinion, this Court cited *Associates Financial Services Company v. Barbour*, 592, So. 2d 191, 199 (Ala. 1991) stating:

> " . . . the essential purpose of punitive damages would be thwarted if we required that they conform to a mathematical equation".

This Appellant is not contending that there must necessarily be an exact mathematical equation between actual loss and punitive award; but clearly the relationship of actual loss in the punitive award is an important factor to consider whether or not the punitive award is excessive from a due process standpoint. The very first post judgment criteria for examining the question of excessiveness

of a punitive award in this Court's opinion of *Green Oil Company v. Hornsby*, 539 So. 2d 218, 223 (Ala. 1989) provides:

> "(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the Defendant's conduct as well as to the harm that actually occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater."

Thus it is clear that this Court in *Green Oil v. Hornsby, supra* recognizes the necessity of there being a "reasonable relationship" between the actual loss and the punitive award. The existence of the post judgment review criteria as found in *Green Oil* was the basis for the United States Supreme Court, in *Haslip, supra*, approving the post judgment procedures in the State of Alabama. If the Alabama Court, post *Haslip*, continues as it has in *Southern Life Insurance Company v. Turner*, 586 So. 2d 854 (Ala. 1991) and *Associates Financial Services Company v. Barbour, supra* to ignore the necessity of a "reasonable relationship" between actual loss and punitive award, then clearly the rationale of the United States Supreme Court's opinion in *Haslip* is misplaced.

The *Haslip* Court did not require an exact "mathematical equation" between actual loss and punitive award; but any reading of *Haslip* teaches that there comes a point where the relationship of actual loss to punitive award exceeds that which is constitutionally permissible. In *Haslip*, the United States Supreme Court found the relationship of 1 to 200 to be "close to the line" of constitutional impropriety.

In finding the relationship of actual loss to punitive award of 1 to 200 to be "close to the line" of constitutional impropriety, United States Supreme Court in *Haslip* did not specify the ratio that would "cross the line". Perhaps such guidance will be forthcoming inasmuch as the United States Supreme Court has granted certiorari in *T.X.O. Production Corporation v. Alliance Resources Corporation, et al.*, 187 W.Va. 457, 419 S.E. 2d 870 (W. Va. 1992), appeal pending, 113 S. Ct. 594, 121 L. Ed. 2d 532, ___ U.S. ___, where the post *Haslip* ratio of actual loss to punitive award was approximately 1 to 526.

Yet regardless of whether the Supreme Court of the United States has determined the ratio which crosses the line of constitutional impropriety, clearly in *Haslip* the requirement of a ratio or relationship exists.

This Court in the instant case, as well as *Southern Life Insurance v. Turner, supra* and *Associates Financial Services v. Barbour, supra*, declined to address the question of whether the relationship of actual loss to punitive award was so disparate as to violate the Defendant's constitutional rights of due process of law. Instead this Court has continued to hold, post *Haslip*, that it would not necessarily require a reasonable relationship between the actual loss and punitive award.

It appears that this Court has consistently ignored the directives of the United States Supreme Court in *Haslip* beginning with the cases which were remanded to the Alabama Court for consideration in light of the *Haslip* opinion. See *Southern Life Insurance Company v. Turner*, 571 So. 2d 1015 (Ala. 1990), vacated, ___ U.S. ___, 111 S. Ct. 1678, 114 L. Ed. 2d 73 (1991), reinstated on remand, 586

So. 2d 854 (Ala. 1991); *Intercontinental Life Insurance Company v. Lindblom*, 571 So. 2d 1092 (Ala. 1990), vacated, ___ U.S. ___, 111 S. Ct. 1575, 113 L. Ed. 2d (1991), reinstated on remand, 598 So. 2d 886 (Ala. 1992). In each of these cases this Court, in its original opinions, had already addressed the *Green Oil* review factors before these two cases reached the United States Supreme Court. On remand, post *Haslip*, this Court simply *again* addressed the *Green Oil* review factors and reinstated the judgment affirmed in its original opinions.

The only logical basis for remand, directing that the cases be considered in light of *Haslip*, would be for the Alabama Court to determine whether the disparity between the actual loss and punitive award violated constitutional due process. This the Alabama Court refused to do and continues to refuse to address.

It stands to reason the United States Supreme Court would not have remanded these cases for the Alabama Court to do what it had already done. If a *Green Oil* type review had been what the United States Supreme Court sought, it appears it simply would have affirmed the decisions in *Southern Life Insurance Company v. Turner, supra* and *Intercontinental Life Insurance Company v. Lindblom, supra*.

For this Court to refuse to even address, from a constitutional due process standpoint the relationship of actual loss to punitive award is basically to deny that such a constitutional issue even exists. Such is in direct contravention of *Haslip* by any reading or interpretation.

In light of the United States Supreme Court's opinion in *Haslip*, Appellant, Reserve National, is at least entitled

to a ruling from this Court on the issue as to whether the relationship of actual loss to punitive award of approximately 1 to 685 (over 3 times the disparity found "close to the line" in *Haslip*) crosses the line of that which is permitted to comply with constitutional due process. To refuse to address such an issue is in and of itself a denial of this party's due process rights. *Opinion Of The Justices*, 345 So. 2d 1354 (Ala. 1977).

Respectfully submitted,

/s/ Philip H. Butler
PHILIP H. BUTLER
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Reserve National
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APPENDIX I

IN THE SUPREME COURT OF ALABAMA

CASE NOS. 1911098 AND 1911099

RESERVE NATIONAL INSURANCE COMPANY
AND PHILLIP BAILEY
Appellants/Cross-Appellees

vs.

RAY CROWELL AND MYRTLE CROWELL,
Appellees/Cross-Appellants

CASE NO. 1911157

RAY CROWELL AND MYRTLE CROWELL
Appellees/Cross Appellants

vs.

RESERVE NATIONAL INSURANCE COMPANY AND
PHILLIP BAILEY
Appellants/Cross-Appellees

BRIEF OF APPELLEES/CROSS-APPELLANTS
RAY CROWELL AND MYRTLE CROWELL

* * *

7. Civil action

Although there had been thirteen previous civil actions against Reserve National in Alabama alone, only the cases of Mock and Paulk were introduced at the trial of this matter. The settlements of $14,000 and $18,000 respectively were not introduced before the jury. However, these settlements apparently were not sufficient to deter this type wrongful conduct by Reserve National and its agents. It therefore appears that Reserve National

has not received any type of punishment of a significant nature growing out of any of its wrongful conduct in Alabama.

Judge Phelps apparently viewed one million dollars as being "too much" punishment in this case. The trial court should not substitute its judgment for that of the jury. *Hammond,* supra. Neither should the trial court override the jury's verdict simply because it believes the jury awarded "too much". There should be a finding by the trial court that the amount of the punitive damage award would shock the judicial conscience. Judge Phelps did not make that determination. Punitive damage awards in fraud cases of one million dollars and more have been affirmed by this Court on a regular basis:

> *Health America vs. Menton,* 551 So.2d 235 (Ala. 1989); Cert. denied ___ U.S. ___ 110 S.Ct. 1166 (1990) – $1,800,000.00 punitive damage award upheld in fraud action;
>
> *Intercontinental Life Insurance Company vs. Lindblom,* 571 So.2d 1092 (Ala. 1990) – $3,000,000 verdict reduced to $1,000,000.00;
>
> Pacific Mutual Life Insurance Company vs. Haislip, 553 So.2d 537 (Ala. 1989) – $1,000,000.00 punitive damage verdict for fraud upheld

In order to achieve deterrence and to uphold the goals of society, this jury verdict for one million dollars should be allowed to stand. Reserve National and others like it, should not be given the false hope and sense of security that they can always go to a trial court judge and achieve a significant reduction in their punitive damage award if the jury verdict goes against them. This verdict

should be affirmed for one million dollars in punitive damages and $25,000 in compensatory damages.

* * *

APPENDIX J

No. 92-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,

Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,

Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF THE BUSINESS COUNCIL OF ALABAMA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

FORREST S. LATTA*
JOHN CHAS. S. PIERCE
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Post Office Box 16046
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Counsel for Amicus Curiae

*Counsel of Record

January 22, 1993

QUESTION PRESENTED

Amicus curiae will address the following issue:

Whether the continued pattern of excessive punitive damage awards after *Pacific Mutual Life Ins. Co. v. Haslip* requires articulation of more definite standards for determining whether a jury verdict satisfies Due Process.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

No. 92-479

TXO PRODUCTION CORP.,

Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,

Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF THE BUSINESS COUNCIL OF ALABAMA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS*

The Business Council of Alabama is a non-profit association of 2,200 businesses of all sizes and types, such as grocers, dry cleaners, restaurants and hardware stores, as well as utilities, manufacturers and insurers. Its members conduct business in every Alabama county, and face demands for punitive damages every day. In a state where such damages can and often do reach into the millions of dollars, punitive awards have a profound impact upon the economic stability of business.

Despite the Court's mandate in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991), disparate punitive awards continue to be rendered and affirmed in Alabama on a scale exceeding pre-*Haslip* levels. The Alabama model for post-verdict review is not having the effect *Haslip* envisioned. To assist the Court in determining whether further standards are needed, *amicus* brings to the Court a summary of Alabama's post-*Haslip* experience. It also suggests a proposal for improved trial and appellate standards in the imposition of punishments.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

If this Court is to consider the effectiveness of the Alabama model for post-verdict review of punitive damages envisioned in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991), common sense suggests the wisdom

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* The parties' letters of consent to the filing of this brief have been filed with the Clerk of the Court.

of reviewing Alabama's post-*Haslip* experience.[1] A review of Alabama trial and appellate results since March 4, 1991, reveals a troubling line of cases which either misapply *Haslip's* Due Process requirements or reject them altogether.

The Alabama model is ineffective. Punitive awards during the twelve months following *Haslip* reached an all-time high – a staggering $200 million dollars. In a state with one of the nation's smallest populations and poorest economies, such verdicts have a sadly debilitating effect.

That punitive damages have reached epidemic proportions in Alabama is both yesterday's news and today's.[2] Two of the four modern cases in which this

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[1] In *Haslip* this Court held that Alabama's jury instructions, in conjunction with its independent post-verdict review at both the trial and appellate stage, satisfied minimum procedural Due Process requirements. This post-verdict scheme, which we refer to as the "Alabama model," contemplates independent review of a punitive award in light of the following "Green Oil" factors, so-named because of their adoption in *Green Oil v. Hornsby*, 539 So. 2d 218 (Ala. 1989):

> (a) the relationship between punitive damages and the defendant's conduct; (b) the degree of reprehensibility of defendant's conduct; (c) the profitability to defendant of the wrongful conduct; (d) the financial position of defendant; (e) the plaintiff's cost of litigation; (f) the imposition of criminal sanctions against defendant; and (g) the existence of other civil awards against defendant for the same conduct.

See Haslip, 111 S.Ct. at 1045.

[2] Frum, *Unreformed*, FORBES, Feb. 1, 1993, at 82 (analysis of the continuing incidence of multimillion dollar punitive verdicts in Alabama).

Court has addressed the issue originated in this state.[3] And despite the Court's gesture in *Pacific Mutual Life Ins. Co. v. Haslip*, the problem of punitive damages has worsened. This is partially due to the lack of ascertainable standards in post-verdict judicial review. The root problem, however, is that juries still are not given meaningful instructions for exercising their discretion. Imposing more post-verdict review measures is no answer. Such an approach is analogous to addressing increased highway accidents by building more hospitals.

Our message as *amicus curiae*: It is no solution to simply reverse and remand this case for compliance with the Alabama model. State courts like Alabama's have failed to come to grips with *Haslip*. Legislatures like Alabama's may be powerless to act. If any lasting solution is to be found, this Court must articulate more definite standards for Due Process in the assessment of civil punishments – both in the imposition of the verdict and in post-verdict review.

ARGUMENT

I. THE ALABAMA MODEL REVIEWED IN *HASLIP* IS INEFFECTIVE.

A. Punitive Damages Jury Verdicts Are Getting Worse

Disproportionate punitive damages verdicts under current procedures in Alabama have reached intolerable

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[3] *Pacific Mutual Life Ins. v. Haslip, supra; Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

levels. In the two years since *Haslip* was handed down, punitive damages in this state have exceeded $350 million dollars. Since January 1, 1987, the total is over $650 million dollars. A ten-year survey yields nearly $800 million dollars.

These are not estimates but are actual amounts derived from a list of punitive damages compiled by *amicus* and reproduced in the Appendix at 3a. The list does not disclose the amount of money that was actually paid by defendants in these lawsuits because, in addition to occasional remittiturs, some cases settle after trial for a sum less than the jury awarded. It also, however, does not account for "shadow verdicts" in the form of other cases which settle before trial. For every case that reaches a verdict, scores of others settle before trial, with settlement results dictated in large part by previous verdicts in similar cases. The latest Alabama figures indicate that pretrial settlements occur in 97 percent of all civil cases.[4] Thus the damages figures compiled in the Appendix are derived only from the 3 percent of cases that are tried to a verdict.

When viewed collectively, the actual jury verdicts and their "shadow" consequences require no exaggeration to suggest that the issue of punitive damages in Alabama is a *billion* dollar matter. Concern over this issue is heightened by the fact that the increase in punitive damages has coincided with a decrease in total civil case filings. After a decade of substantial growth, circuit court

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[4] *From the Editors*, 8 ALA. DEF. LAW. A.J. at 5 (October, 1992).

filings in Alabama decreased slightly in 1992,[5] yet punitive damages continued to increase in size and frequency.

As in most states, punitive damages in Alabama are state compelled action permitted by common law as a tool to further society's interest in regulating wrongful conduct. They are the civil court equivalent of criminal fines, which Alabama allows to be paid to the plaintiff rather than the State. Chief Justice Rehnquist has described such windfalls as a "bounty" authorized by the state for bringing an offender to justice. *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). Punitive damages claims which once were infrequent are now demanded in virtually every tort case. The result is a civil justice system heavily weighted with quasi-criminal features, producing punitive awards that are grossly out of balance with the actual harm, but which reward the plaintiff handsomely.

A post-*Haslip* example of unbridled jury discretion in Alabama is *Ira Gore v. B.M.W.*, No. 90-CV-9658 (Jefferson Co. Cir. Ct., June 8, 1992), on appeal (Nos. 1920324 and 1920325), involving a plaintiff who purchased an automobile which had a defective paint job. The plaintiff complained he was defrauded, purchasing an automobile as new when in fact its original paint job was contaminated by acid rain. In addition to the $4,000 difference in value of the car, plaintiff was awarded a windfall $4 *million* dollars to "punish" the defendant. The verdict was upheld in its entirety by the trial court. Additionally,

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[5] Source: State of Alabama, Administrative Office of Courts (1993).

plaintiff's attorneys obtained through discovery the names of other BMW customers who purchased similar cars. More such lawsuits are now pending.

In *Sheridan v. Northwestern Mut. Life Ins. Co.*, No. 89-CV-2505-PR (Montgomery Co. Cir. Ct., April 10, 1992), on appeal (No. 1911110), a jury awarded $25 million to a couple who purchased an insurance product from an agent who pocketed some of the premiums, thus rendering the company as much a victim as the customers. When Northwestern found the problem it voluntarily restored all economic loss to the plaintiffs ($9,000) and to other customers who were victimized. The agent subsequently disappeared, abandoning his car at a nearby international airport. A jury awarded separate punitive damage verdicts of $12.5 million against the renegade agent and the company. The trial judge, however, ordered Northwestern to ante the *full* $25 million without any remittitur. While the case was pending, plaintiff's attorney issued a newspaper invitation to meet other potential plaintiffs at a local hotel. More such lawsuits are now pending.

The best barometer of the explosive growth of punitive damages in Alabama is a historical comparison of the size of wrongful death verdicts, which, since 1859, have consisted of *purely* punitive damages. *See* ALA CODE § 6-5-410 (1975); *Alabama Great Southern R.R. v. Burgess*, 116 Ala. 509, 22 So. 913 (1897); *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249 (Ala. 1986). Thus the law in that field has remained a constant against which to fairly

measure the upward growth in punitive damages.[6] A table demonstrating the historical trend of wrongful death verdicts is reproduced in the Appendix at A1. Prior to 1900 the largest such verdict, adjusted to 1988 dollars, was $150,000. *Richmond & D.R.R. v. Freeman*, 97 Ala. 298, 11 So. 800 (1892). Before 1970 the largest verdict, adjusted to 1988 dollars, was $307,000. *Airheart v. Green*, 267 Ala. 689, 104 So.2d 687 (1958); *Liberty Nat'l Life Ins. Co. v. Weldon*, 267 Ala. 171, 100 So. 2d 696 (1958). In the past five years, several multi-*million* dollar wrongful death verdicts have been rendered and affirmed, the largest being $7.5 million *after* remittiur from $15 million. *General Motors Corp. v. Johnston*, 592 So. 2d 1054 (ALa. 1992). In the two years since *Haslip* was handed down, punitive damage verdicts in wrongful death cases have exceeded $59 *million* dollars.

B. Disparate Punitive Damages Are Still Being Affirmed

The above discussion is not offered to suggest that Alabama has declined to remit *any* punitive awards since *Haslip*. However, the Alabama court is typical of state courts which have failed to come to grips with the principles outlined in *Haslip*. Instead of examining what amount is "reasonably necessary" to achieve the punitive purposes, the Alabama court asks what is the *most* a jury

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[6] It bears noting that Alabama is unique in the nation in allowing plaintiffs to recover punitive damages in wrongful death actions upon proof of nothing more than "simple negligence." *Black Belt Wood., supra* ($2.5 million punishment for "simple negligence").

could reasonably award, and it remits the verdict to that sum.[7] This is the *Haslip* test applied in reverse. The Court conducts its "comparative analysis" without reference to smaller verdicts, the effect of which is to continually raise the ceiling.

The rationale for the Alabama court's comparative analysis in relation to the *highest* similar awards stems from its insistence that a jury verdict carries a strong "presumption of correctness." Indeed, this insistence exposes an incorrect premise upon which the *Haslip* opinion relied in affirming the Alabama model: that the appellate court has the power to independently review a punitive damages award.[8] No less than four days after *Haslip* was published, the Alabama court struck down legislation which statutorily authorized courts to abandon the "presumption of correctness" standard in reviewing punitive damages verdicts. *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991). The effect of this standard is compounded by the fact that Alabama appellate courts impose a *double* measure of deference to punitive damages verdicts which have been upheld by the trial court, holding that the "presumption of correctness" is thereby "strengthened." *Id.* at 420.

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[7] For example, in *General Motors Corp. v. Johnston*, 592 So. 2d 1054 (Ala. 1992), the court justified its remittitur of a $15 million dollar wrongful death award to $7.5 million by pointing to other large verdicts in wrongful death cases ranging from $4 to $12.5 million "in order to assure some degree of uniformity." *Id.* at 1064.

[8] *See Haslip*, 111 S. Ct. 1032, 1044.

In view of Alabama's extraordinarily deferential standard of review, it is not surprising that disparate punitive awards have repeatedly been upheld since *Haslip*. The Alabama court further insists upon rejecting *Haslip's* mandate that punitive and compensatory damages should bear a rational relationship. In a case remanded from this Court for review of a $500,000 punitive damages verdict, the Alabama court said, "Imposing . . . a relationship [between compensatory and punitive damages] would inevitably result in *injustice*, and we decline to impose it."[9] *Southern Life Ins. Co. v. Turner*, 586 So.2d 854, 858 (Ala. 1991) (compensatory damages of $1,000). This was no 'slip of the pen.' The same view has been reiterated in other cases which rejected the requirement of a relationship between punitive and compensatory damages as *contrary* to justice.[10] Furthermore, within the past two years, the Alabama court has made clear its view that *no compensatory damages* need be

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[9] The Alabama court once subscribed to the belief that "the amount awarded as damages must bear some reasonable relation to the injury sustained and even though there might be a small mount of actual damages to be awarded, the amount allowed as punitive damages should not be disproportionate thereto." *Roberson v. McCarley*, 259 Ala. 583, 67 So. 2d 814, 817 (1953). That view has long since been abandoned.

[10] *See Associates Financial Services Corp. v. Barbour*, 592 So. 2d 191, 199 (Ala. 1991) (punitive purpose would be thwarted if any predictable relationship was required); *General Motors Corp. v. Johnston*, 592 So. 2d 1054 (Ala. 1992) (holding that punitive damages need bear no relationship to actual damages).

awarded to support a substantial punitive damages verdict.[11]

In *Southen [sic] Life & Health v. Turner, supra,* the Alabama court on remand from this Court reconsidered and reaffirmed a punitive award 499 times greater than compensatory damages. Noting that the opinion ignored *Haslip's* mandate for a relationship between compensatory and punitive damages, the court's senior member took the majority to task, stating, "the Court, on remand, clearly has not reconsidered the judgment and addressed an issue the Supreme Court of the United States considers relevant – the size of the punitive damages award when compared to the actual loss suffered." *Turner,* 586 So. 2d at 860 (Maddox, J., concurring in the result). On dissent from the court's denial of defendant's *Application for Stay,* he openly commented that the court's post-verdict review procedure was not working:

> It is frequently said that persons should rely more on what a person *does* than upon what he *says.* What this Court has *done,* especially since *Haslip* was released, shows that the procedure found in *Haslip* to be meaningful and adequate may not be.
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> I Think that the Supreme Court of the United States may have been led to believe that a type of "independent review" was occurring, when in fact it was not, and is not.

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[11] *See Shoals Ford v. McKinney,* 605 So. 2d 1197 (Ala. 1992); *Caterpillar v. Hightower,* 605 So. 2d 1193 (Ala. 1992); *First Bank of Boaz v. Fielder,* 590 So. 2d 893 (Ala. 1991).

Southern Life & Health Ins. Co. v. Turner, No. 88-1289, slip op. 2, 4 (Ala. Sept. 11, 1991) (Maddox, J., dissenting).

Instead of embracing the mandate for rational relationship, the Alabama court has adopted a self-congratulatory interpretation of *Haslip* as blanket approval of its post-verdict review process. The repeated affirmance of ever-larger punitive awards, however, belies the fact that the model is little more than 'window dressing' for a practice that actually treats jury verdicts as sacrosanct.[12]

In *Principal Financial Group v. Thomas*, 585 So. 2d 816 (Ala. 1991), the Court upheld a $750,000 judgment for failure to pay a $1,000 disability insurance contract claim – a 750 to 1 ratio, even though defendant's contractual liability was not finally resolved until the jury decided the issue in favor of the plaintiff. The trial court first set aside the award on post-verdict review. On appeal, the Alabama Supreme Court reinstated the full award based upon the "presumption of correctness" and the court's articulation for the first time of a new legal rule to support the $1,000 compensatory award.[13]

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[12] *See*, for example, *Continental Eagle Corp. v. Mokrzycki*, ___ So. 2d ___, 1992 WL 341848 at *5, wherein the Alabama court regarded itself as *"Bound"* by a $100,000 punitive verdict due to the "presumption of correctness."

[13] Although it was undisputed that defendant's denial of the disability claim had nothing to do with the death of plaintiff's daughter from cancer, the Alabama court found justification for the $750,000 punitive award in part because plaintiff's daughter died of her disabling illness. Observing that "parents should not have to bury their children," the court's opinion suggests that the company's refusal to pay the claim at a time of profound grief for the mother served as partial justification for such punishment.

In *Intercontinental Life Ins. Co. v. Lindblom*, 598 So. 2d 887 (Ala. 1992), the Alabama court, on remand in light of *Haslip*, reinstated a $1 million punitive award where compensatory damages were $12,400. In a concurring opinion, Alabama's senior justice again stated that "Post-*Haslip* reviews by this Court, including this one, indicate that the procedures, when actually applied are not adequate and meaningful." *Lindblom*, 598 So. 2d at 892 n.4.

In *Fraser v. Reynolds*, 588 So. 2d 488 (Ala. 1992), the Alabama court conducted no real *Haslip* analysis at all. *See Fraser*, 588 So. 2d at 453 (Maddox, J., dissenting). The case was tried twice, with the first jury awarding punitive damages of $30,000 and the second jury awarding $375,000. Despite a dissent which noted that such disparity between the awards suggested the higher award may not be fully necessary to accomplish society's goals, the Alabama court summarily affirmed without any post-verdict analysis of the amount. *Fraser*, 588 So. 2d at 455. *See also, Union Mortgage Co. v. Barlow*, 595 So. 2d 1335 (Ala. 1992) (Actual damages $6,000; punitive damages $6 million with no appellate analysis of excessiveness).

Alabama trial and appellate decisions over the past year reveal a state judiciary which has repeatedly failed to apply *Haslip's* directives in a meaningful way. In sum, the Alabama scheme for post-verdict review as envisioned and approved by the Court in *Haslip* is not effective, even in the state whence it originated.

C. Legislative Solutions May Be an Impossibility

Amicus agrees it would be preferable if this problem were capable of being resolved on the state level by legislation, as Justice Scalia and other members of this Court have suggested.[14] Unfortunately it is not – at least not in Alabama. Justice Scalia's separate opinion in *Haslip* was premised on the assumption that Alabama and other "[s]tate legislatures . . . have the power to restrict or abolish the common-law practice of punitive damages." *Haslip*, 111 S.Ct. at 1054. He specifically referenced limitations in Florida and Virginia. While those statutes have been judicially upheld, the Alabama Supreme Court has demonstrated a propensity to strike down every statute it has considered which would establish reasonable limitations on punitive damages. Other state courts likewise have declared certain statutory restrictions on the amount of damages invalid.

It does not take six, seven, and eight figure awards to punish defendants in most civil cases – which is what the

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[14] *Haslip*, 111 S.Ct. at 1054 (Scalia, J., concurring specially). Justice O'Connor observed, " . . . state legislatures could establish fixed monetary limits for awards of punitive damages for particular kinds of conduct." *Haslip*, 111 S.Ct. at 1064 (O'Connor, J., dissenting). And in *Browning-Ferris*, Justice Brennan commented that Due Process is even "less indulgent" of awards made "without the benefit of a legislature's deliberation" than those that fall within statutory limits. *Browning-Ferris Ind. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1990) (Brennan, J., concurring). The question "whether due process acts as a check on undue jury discretion . . . in the absence of any express statutory limit" *assumes* the validity of legislative power to act in the realm of punitive damages. As noted in the text, that assumption may be incorrect. *See Haslip*, 111 S.Ct. at 1044 n.9.

1987 Alabama Legislature indicated by unanimously passing several major revisions to the common law of punitive damages.

As noted above, one of those changes removed the protected status of jury verdicts by abolishing the "presumption of correctness," thereby allowing the court to take an independent role in reviewing punitive damages awards. *See* ALA. CODE §§ 6-11-23, 6-11-24 (Cum. Supp. 1991). Despite being vested with broader power, the Alabama court invalidated the statute on "separation of powers" grounds (though neither party on appeal had raised a constitutional challenge to the statute). *See Armstrong v. Rogers's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991).

The Alabama court also has stricken a statute limiting noneconomic damages (including punitives) to $400,000 in medical malpractice cases, on grounds that it violated the right to jury trial. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1992); ALA. CODE § 6-5-544 (Cum. Supp. 1991). Likewise, it struck down a statute which allowed for periodic payment of "future damages" on right to jury trial grounds. *Clark v. Container Corp. of America*, 589 So. 2d 184 (Ala. 1991); ALA. CODE § 6-11-3 (Cum. Supp. 1991). The court presently is considering whether to strike down a statute which limits punitive damages to $250,000 (subject to certain statutory exceptions). *Alabama Power Co. v. Henderson*, No. 88-CV-992 (Tuscaloosa Co. Cir. Ct., August 1991), On Appeal (No. 1901875); ALA. CODE § 6-11-21 (Cum. Supp. 1991). The main focus of the challenge is, again, the right to jury trial.

Such decisions would lead one to believe that Alabama's right to jury trial is the broadest in the nation, when in truth it is phrased in terms much narrower than the Seventh Amendment. *Compare* U.S. CONST. amend. VII *with* ALA. CONST. § 11. The Alabama court, however, takes a strong populist view of individual rights in relation to legislative power in the realm of common law tort limitations. Thus, for states like Alabama, a legislative solution to the problem of excessive punitive damages may be an impossibility.

II. THE COURT MUST ARTICULATE AN ASCERTAINABLE STANDARD

A. The Root Problem Is Still the Lack of Jury Standards

Regardless of what post-verdict review standards are imposed, until the root problem is solved, the situation will not improve. There is no rational justification for a post-verdict review process which attaches extraordinary deference to punitive damages verdicts unless they are the product of sufficiently guided and informed juries. Twenty years ago, when punitive damages were infrequent and insubstantial, basic jury instructions on punitive damages may have been acceptable. In the present environment they are not. If society were presented with a trend of increasing highway injuries, instead of disparate punitive damages awards, it would not address the problem by building more hospitals. Road improvements, speed limits, and improved training would be the first order of business. Likewise, the problem of irrational

punitive damages should be addressed on the 'front end' before imposing additional post-verdict review measures.

Informing a jury that the imposition of damages is entirely discretionary, and asking them to simply take into account the "character and degree of the wrong," provides no meaningful guidance.[15] It invites juries to return verdicts based upon how they "feel" in response to a defendant's misconduct. *Haslip,* 111 S.Ct. at 1057. (O'Connor, J., dissenting). When harm has resulted that cannot be rectified with money, there is an added element of frustration which leads to irrational results. Large defendants, perceived to have substantial resources, are inevitably targets for vengeance and frustrated fury.

Such jury charges fit very nicely into skilled plaintiffs' counsel's "send a message" closing argument – a formula that inevitably leads to substantial punitive damages having no relationship to the actual harm. Counsel first exhorts the jury to determine an amount sufficient to punish and deter *this* defendant, which, if the defendant is big, must be substantial. Counsel then exhorts the jury to determine an amount adequate to deter others like this defendant from committing similar wrongs. Again, this sum must be so substantial as to "reach the corporate offices" of other businesses through the news media. Then add the two. Such a formula affords the jury no rational guidance and produces verdicts that bear no understandable relationship to compensatory damages. As Justice Brennan noted, "guidance like this is scarcely

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[15] *See Alabama Pattern Jury Instructions* 11.03 (1974).

better than no guidance at all." *Browning-Ferris*, 492 U.S. 257, 280 (Brennan, J., concurring).

Unfortunately such verdicts, prominently reported in the media and sanctioned by the courts, inevitably multiply. In states like Alabama and West Virginia they have gotten out of hand. Any modern criminal procedure which licensed juries to use their discretion to 'send a message' by their sentence would be rejected as barbaric.[16] That, however, is the *status quo* in civil cass[sic] in Alabama where juries are told, in the heat of the moment, that the amount of punishment is entirely discretionary. Such instructions are perfectly tailored to a 'more is better' argument. Policy decisions of such magnitude should occur in a more rational setting, not on an arbitrary basis. In the absence of statutory limits, they must at least be the result of instructions which better define the parameters within which a jury may act so as to reduce the risk of arbitrary results. The necessity for such instructions is doubly important in states like Alabama, where jury verdicts are accorded extraordinary deference.

As the Alabama court acknowledged before *Haslip*, there presently is no "yardstick" for the jury to use in measuring the amount of punitive damages that should be awarded.[17] *Green Oil v. Horsby*, 539 So. 2d 218, 222

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[16] *See Stringer v. Mississippi*, 112 S.Ct. 1130 (1992) (Recognizing the due process requirement of adequate jury instructions during the sentencing phase of a criminal prosecution.)

[17] Justice O'Connor in *Haslip* noted that the Alabama Supreme Curt itself acknowledged that its jury instruction procedures give "unguided discretion" and in no way dictate a rational jury verdict. (citing *Green Oil*, 539 So.2d at 222;

(Ala. 1989); *Rideout's-Brown Service, Inc. v. Holloway,* 397 So. 2d 125, 127 (Ala. 1981) (Jones, J., concurring). Such a yardstick should be calibrated to tell the jury, for example, how the alleged misconduct compares to other types of fault in the range of misconduct. Neither are juries told that punitive damages must bear a rational relationship to the actual harm, as measured by compensatory damages. As Justice O'Connor noted in *Haslip,* juries in Alabama are not even instructed on the "Green Oil" factors by which their verdict will later be evaluated.[18] They are blind to the indicia of fairness, guided only by their instinctive reaction toward the defendant.

Due process imposes a rule of law upon the human impulse towards vengeance. It requires at a minimum an objective damages 'range,' a maximum ratio of punitive to actual damages, or both. As Alabama's experience teaches, no progress will be made toward that end until and unless this Court takes the lead in mandating more meaningful jury instructions.

B. Appellate Courts Need More Ascertainable Guidelines

In approving the Alabama Model for Post-verdict review in *Haslip,* this Court concluded that a punitive

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Rideout's-Brown Service, Inc. v. Holloway, 397 So. 2d 125, 127-28 (Ala. 1981)). "Thus [it] . . . recognizes that its common law procedures produce irrational results, yet insists on deferring to these results." *Haslip,* 111 S.Ct. at 1063 (O'Connor, J., dissenting).

[18] The *Green Oil* factors in the Alabama model are set forth *supra* in footnote 2.

award reflecting a multiple of four times the compensatory damages was "close to the line" of Due Process prohibition. Unfortunately, state courts have been unable to discern the contours of that line. Again, we will confine our discussion to Alabama.

As stated above, less than six months after *Haslip* was announced, the Alabama court rejected any notion that punitive and compensatory damages must bear a rational relationship, on grounds that such a requirement "would inevitably result in injustice." *Southern Life & Health Ins. Co. v. Turner,* 586 So. 2d 854, 858 (Ala. 1986). That view has since been reiterated. *See Associates Financial Services Corp. v. Barbour,* 592 So. 2d at 199; *General Motors Corp. v. Johnston,* 592 So. 2d at 1063. *But see, Intercontinental Life Ins. Co. v. Lindblom,* 598 So. 2d 886, 891 (Ala. 1992) (citing a "rational relationship" between $12,400 compensatory and $1 million punitive damages).

Eschewing such a relationship, the court relies exclusively upon its *Green Oil* test in evaluating jury verdicts under a "presumption of correctness." A review of Alabama cases wherein the model was utilized, however, reveals it is largely form without substance. Massive punitive damages are repeatedly affirmed, without regard to their relationship to the compensatory award. At its core, the Alabama model is an articulation of the considerations behind the traditional standard of whether a verdict "shocks the judicial conscience." *See Green Oil,* 539 So. 2d 218 (Ala. 1989); *Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986); Carr, *Punitive Damages and Post-Verdict Procedures: Where Are We Now and Where Do We Go From Here?* 51 ALA. LAW. 90 (March, 1990).

As Justice Scalia has noted, a "shock the conscience" standard is really no standard at all.[19] It results in "jury-like verdicts" by appellate courts based upon their own subjective notions rather than objective standards. *Haslip*, 111 S.Ct. at 1046 (Scalia, J., concurring). By endorsing the Alabama model, *Haslip* merely transferred subjective discretion to the reviewing courts. Requiring a reasonable relationship between actual and punitive damages requires further articulation, because *any* ratio of punitive damages can and has been found to be reasonable.

Measured against appellate decisions only 10 years ago, it now takes a much larger jolt to shock the conscience of judges in jurisdictions like Alabama. Members of the trial bench and bar have become desensitized, like persons who frequent horror movies. Alabama decisions over the past 20 years reflect an increase in punitive damages awards that vastly exceeds the rate of economic growth. The aggregate of such awards is truly astounding, as shown in the Appendix tables.

The mere incarnation of a subjective post-verdict standard is no substitute for meaningful enforcement of a defendant's right to fair punishment. Alabama, however, is not alone in failing to apply the principles outlined in *Haslip* in a meaningful way. The courts need more ascertainable guidelines for determining which punitive damages awards satisfy Due Process as compared to those which should be treated as suspect or facially excessive.

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[19] *See Browning-Ferris Ind., Inc. v. Kelco Disposal, Inc.*, Official Transcript of Proceedings Before The Supreme Court of the United States, at 24-27.

C. Amicus Curiae's Proposal for More Definite Standards

If any uniformity is to be achieved, this Court must articulate a more discernible standard for determining what measure of punitive damages "cross[es] the line." In most cases, a 3-to-1 ratio suggests itself as a reasonable standard, as evidenced by accepted statutory schemes which utilize that formula throughout the nation. A multiple of four is "close to the line" but not unconstitutional, as suggested by *Haslip*. Any multiple greater than five should be judicially regarded as suspect (if not facially excessive) where it exceeds the 'profit removal' and 'cost of litigation' criteria in the Alabama model.[20]

Moreover, this Court should recognize that a blanket "presumption of correctness" effectively eliminates an important layer of Due Process protection – especially in cases where juries are not given sufficiently meaningful instructions. A judicial policy of maximum deference, mixed with a lack of jury standards, is a recipe for disaster. Thus, in jurisdictions where verdicts are buttressed by extraordinary deference, as in Alabama, Due Process requires that juries be furnished instructions which establish more meaningful parameters and guidelines so as to avoid arbitrary and irrational punishments.

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[20] *See* footnote 2, *supra*.

CONCLUSION

The judgment of the Supreme Court of Appeals of West Virginia should be reversed.

Respectfully submitted,

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APPENDIX K

SOUTHERN LIFE AND HEALTH INSURANCE COMPANY and Richard Perry

v.

Lucy R. TURNER.

88-1289.

Supreme Court of Alabama.

Aug. 23, 1991.

MADDOX, Justice (concurring in the result).

In its brief, Southern Life argues that "[b]y remanding this case to this Court for further consideration in light of *Pacific Mutual [v. Haslip,* ___ U.S. ___, 111 S.Ct. 1032 (1991)], the Supreme Court has clearly indicated its view that there is a substantial likelihood that the $499,000 punitive damages award inflicted against Southern Life and Mr. Perry violates the new due process standards articulated in that case."

Lucy Turner views the issue differently. In her brief, she states that "Alabama's constitutionally acceptable procedures for scrutinizing punitive verdicts for excessiveness were applied properly in the trial court and on appellate review," and that "[p]ursuant to the United States Supreme Court's mandate, this Court should reaffirm the Judgment."

It is apparent, therefore, based on these opposing arguments, that the parties disagree on the scope of this Court's review in accordance with the Supreme Court's mandate. Frankly, I cannot tell at this point which party has the better argument, but it would appear that this

Court was ordered to do more than merely reaffirm the judgment entered before without considering whether the $499,000 punitive damages award was excessive, especially in view of the fact that it was almost 500 times greater than the actual compensatory damages suffered by the plaintiff.

It would appear that the Supreme Court, in *Haslip*, did more than merely approve the Alabama procedure for review of punitive damages awards, because the Court, in *Haslip*, reviewed the $840,000 award made in that case to determine independently whether due process requirements were met. The Court stated:

> "We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses of respondent Haslip, . . . and, of course, is much in excess of the fine that could be imposed for insurance fraud under Ala. Code §§ 13A-5-11 and 13A-5-12(a) (1982), and §§ 27-1-12, 27-12-17 and 27-12-23 (1986). Imprisonment, however, could also be required of an individual in the criminal context. While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety."

___ U.S. at ___, 111 S.Ct. at 1046.

If the mandate of the Supreme Court requires this Court to apply the *Haslip* guidelines, i.e., to consider the size of the punitive damages award as compared to the amount of actual monetary loss suffered, and the size of the

punitive award as compared to a penalty that could be imposed for insurance fraud, then this Court has not fully understood the scope of the mandate. On the other hand, if the Supreme Court was mandating that this Court review once again what this Court had already done, then Ms. Turner is correct and the judgment is due to be affirmed once again.

If the Supreme Court mandated that this Court consider the judgment again in view of what that Court said in *Haslip* about the necessity of comparing a punitive damages award with the amount of compensatory damages awarded, then there is a serious question of whether the $500,000 judgment can stand, because the punitive damages award by the jury in this case was 4,999 times larger than the monetary loss suffered, and even after remittitur was 499 times greater than the loss suffered. If the $840,000 punitive damages award in *Haslip*, which was "4 times the amount of compensatory damages," was "close to the line . . . of constitutional impropriety," (*Haslip*, ___ U.S. at ___, 111 S.Ct. at 1046), then the award in this case, which is 499 times the amount of compensatory damages, must "cross the line," because the $499,000 punitive award has no "understandable relationship to compensatory damages." ___ U.S. at ___, 111 S.Ct. at 1045.

This Court, on remand, clearly has not reconsidered the judgment and addressed an issue the Supreme Court of the United States considers to be relevant – the size of the punitive damages award when compared to the actual loss suffered. On the contrary, this Court specifically states that it finds "no compelling reason to set an

arbitrary mathematical relationship between compensatory and punitive damages," and that "[s]uch a relationship would inevitably result in injustice, and we decline to impose it." If that holding says what it seems to say, then this Court believes that a comparison of the size of the punitive damages award to the amount of actual loss suffered is not relevant. Of course, the Supreme Court of the United States seems to say that such a comparison is relevant.

Based on these facts, I have reservations about concurring in this Court's affirmance of the judgment, and I would disagree with the result if I could be absolutely sure about what the Supreme Court of the United States meant when it mandated a reconsideration of this case in view of the *Haslip* case. The Supreme Court of the United States must have been aware that the original verdict in this case was for $5,000,000 and that the trial judge, after conducting a *Hammond*-type hearing, ordered a remittitur of all but $500,000 of that verdict. The Supreme Court also must have been aware that this Court had conducted a review of that trial court action on the original appeal. At that time, I concurred in the affirmance of the judgment, but specifically stated that I had dissented in the *Haslip* case, and that my dissent in *Haslip* would be adopted by the Supreme Court of the United States. It was not, of course; therefore, I must assume that the Supreme Court of the United States is of the opinion that the *Hammond-Green Oil* reviews are adequate and meaningful.

I stated in the dissent in *Pacific Mutual Life Insurance Co. v. Haslip*, 553 So.2d 537, 545 (Ala.1989) that "[w]hile I applaud the procedure this Court has adopted to review

and revise the jury's decision based on its 'standardless discretion,' I cannot believe that procedure is sufficient to accord to litigants all the due process protection the Constitution envisions." The Supreme Court concluded otherwise, and held that those procedures were adequate and meaningful. Post-*Haslip* reviews by this Court, including this one, indicate that the procedures, when actually applied, are not adequate and meaningful, as I have pointed out in dissents. In *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So.2d 414 (Ala.1991), this Court overturned a trial court's judgment on review of a punitive damages award and held a state statute unconstitutional, even though the constitutionality of the statute had not been raised. In *Principal Financial Group v. Thomas*, 585 So.2d 816 (Ala.1991), this Court upheld a $750,000 judgment, which was 750 times higher than the compensatory damages, even though the contractual issue of the liability of the company to pay was not finally determined until the jury resolved the issue in favor of the policyholder after a trial of the case.

I concurred in the judgment on our original review of this case on condition the Supreme Court affirm the *Haslip* decision of this Court. That Court not only has affirmed that decision, but has remanded this case for reconsideration in light of *Haslip*.

While I do not read *Haslip* as saying all that some other members of this Court apparently seem to think it says, I was wrong in my assessment of what the Supreme Court would decide in the *Haslip* case; therefore, I concur in the result only.

Supreme Court, U.S.
FILED
JUL 6 1993
OFFICE OF THE CLERK

No. 92-1978

In The

Supreme Court of the United States

October Term, 1992

RESERVE NATIONAL INSURANCE COMPANY,

Petitioner,

v.

RAY CROWELL AND MYRTLE CROWELL,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Alabama

BRIEF OF RESPONDENTS RAY CROWELL AND MYRTLE CROWELL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

1. Whether the Supreme Court of the United States should grant a Petition For A Writ Of Certiorari to the Supreme Court of Alabama when the Supreme Court of Alabama has carefully examined the trial court's analysis of the punitive damage verdict and then affirmed the trial court's opinion to remit the punitive damage verdict from one million dollars to $600,000?

2. Whether the Supreme Court of the United States should grant a Petition For A Writ Of Certiorari to the Supreme Court of Alabama because the Supreme Court of Alabama refused to adopt a "punitive damage" to "actual damage" ratio and apply such a ratio to this case?

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STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

Ray Crowell, who is 74 years of age, is married to Myrtle Lettie Crowell, 68 years old. They have been married for over 52 years and live in Dozier, Alabama. They have four children, one of whom is Dorothy Ziglar. Ray is totally disabled and has drawn social security benefits since approximately 1967. Myrtle has only an eighth grade education, although she did get her GED.

Reserve National is an insurance company headquartered in Oklahoma City, Oklahoma that primarily targets (its sales efforts at) people living in rural areas. Reserve National targets the rural elderly in Alabama for the sale of medicare supplement insurance policies.

Phillip Bailey was a licensed agent of Reserve National on September 2, 1988. Bailey has had years of experience in the insurance industry. Bailey has been hired and terminated by Reserve National on three different occasions. Each of his terminations was based on his failure to sell enough insurance policies. Bailey was rehired a third time by Reserve National on February 23, 1990 *after* the frauds proven in this lawsuit had been brought to the attention of Reserve National.

Bailey was trained by Reserve National to sell medicare supplement policies. He understood the procedures to follow as established by the company. He worked only as a "captive agent" for Reserve National while employed by them. Bailey had a certain quota of sales (established by the company) to meet each month. He had to collect a minimum of $800 in premiums a week, or Reserve

National would terminate him. Although Bailey has sold the particular Reserve National medicare supplement policy (at issue in this suit) to approximately 60 people, he has not read the policy from beginning to end. Reserve National has not disciplined Bailey for his failure to read the policy that he is selling to elderly people. Bailey knows how to fill out a medicare supplement policy application because he was instructed by Reserve National on how to do it and because he has done it many times. Bailey sold a Reserve National medicare supplement policy to the Crowells on September 2, 1988 at a time when the Crowells had existing medicare supplement coverage with Liberty National Life Insurance Company.

Of significant importance is Bailey's knowledge of Alabama law requiring the agent and his insurance company to complete a "replacement form" when selling a medicare supplement policy which "replaces" an existing medicare supplement policy. Pursuant to Regulation #71 Section 5 of the Alabama Department of Insurance, (Plaintiff's Exhibit #23):

> An insurer, within five working days from the receipt, at its policy issuance office, of an application for medicare supplement insurance in replacement of a previously issued policy, shall furnish to the insurer whose policy is being replaced, a copy of the replacement notice . . .

Without dispute, Bailey and Reserve National were aware of this regulation. No replacement form was ever completed by the Defendants, given to the Crowells, or sent to Liberty National.

The importance of the replacement form is that it tells customers that there may be "pre-existing conditions" that are not covered under the policy to be issued. It also tells customers that they probably need to call their agent (with the company whose policy is to be replaced) so that he will have an opportunity to make a fair comparison of the two policies.

Joseph D. Cope, an agent for Liberty National, was servicing the Crowells' policies with Liberty National in 1988. If a replacement form had been filled out by Reserve National's agent and forwarded to Liberty National, then Cope would have eventually gotten notice of the proposed replacement. Upon receiving the replacement form, Cope would have contacted the Crowells, met with them, and compared the Liberty National and Reserve National policies. He would have tried to convince them to keep the Liberty National policy that they already had. However, Cope did not receive any notice of the replacement of the Crowells' Liberty National policies. At the time of trial, Cope had made a comparison between the Crowells' Liberty National medicare supplement policies and the Reserve National medicare supplement policy that the Crowells bought from Bailey. In Cope's opinion, the Liberty National policies had a few better provisions than the Reserve National policy, and the Reserve National policy had a few better provisions than the Liberty National policies. Basically, in Cope's opinion, "they wash out". Of crucial importance is that the Crowells had already served their waiting period for pre-existing conditions under the Liberty National policies. Based on Mr. Cope's observation, the Crowells did

not get any benefit in changing their insurance from Liberty National to Reserve National.

The replacement of the Crowells' Liberty National insurance by Reserve National occurred on the evening of September 2, 1988. After finishing supper, Bailey, the Crowells, and the McVays (relatives of the Crowells) went to the Crowells' living room and sat in a circle while Bailey got out his insurance forms and talked about what Reserve National had to offer. Myrtle told Bailey in the beginning that the Crowells had Liberty National medicare supplement policies. Myrtle told Bailey that she and Ray each were paying $43 a month for their separate policies for a total of $86. Bailey asked if the Crowells had been sick or in the hospital in the past two years. Myrtle told Bailey that Ray had been to the doctor the first day of August with a flare up of his prostate. She also showed Bailey Ray's medicine bottle that the doctors had prescribed for Ray's prostate problem. Myrtle told Bailey that she had a problem with her thyroid gland and that she was taking medication. The Crowells also told Bailey that Ray had a heart condition and that Ray had a light heart attack in May, 1980. Myrtle showed Bailey the medication that Ray was taking for that problem as well. The Crowells answered Bailey's questions truthfully.

Bailey told the Crowells that Reserve National had a pre-existing conditions benefit policy that the Crowells could take out but that the Crowells would have to pay an extra month's premium for this coverage. According to Bailey, this would cover the Crowells immediately for all pre-existing health problems, including Ray's prostate problems. Bailey told the Crowells that with their pre-existing conditions, they could have immediate coverage

which would be effective as of that day, meaning September 2, 1988.

Bailey then told the Crowells that the monthly premium for the Reserve National medicare supplement policy covering both Ray and Myrtle would only be $96.25 per month. This was approximately $10 more per month than what the Crowells had been paying on their two Liberty National policies. Bailey told the Crowells that the Reserve National policy would pay more and was a better policy than the Liberty National policies. He assured the Crowells that they would not have anything to worry about concerning the pre-existing conditions with Reserve National. He further emphasized that the effective date of the policy was September 2, 1988, the date of the application. Myrtle told Bailey that she and Ray did not have that much money and that the Crowells could not carry a Reserve National policy as well as their Liberty National policies.

Based on Bailey's statements that night, the Crowells paid Bailey $207.50 and purchased the Reserve National policy. The figure of $207.50 reflects two monthly premiums of $96.25 each plus a $15 registration fee. The Crowells did not have enough money to pay the $207.50. Myrtle had to borrow $96.00 from her brother Joe McVay to have the extra month's premium for the pre-existing condition coverage. McVay wrote a personal check to Reserve National for $96.00.

Bailey filled out an application for the Crowells on September 2, 1988. Ray signed the application. Bailey then took the application back, put it in his bag, got up, and started out the door. Bailey gave a receipt for the

$207.50 and told everyone that when he handed Myrtle the receipt the Crowells were covered.

Bailey admits that he told the Crowells that if they paid another month's premium that they would have immediate coverage. He further testified "I don't know to this date why I told them that". Bailey admitted telling the Crowells that not only would they get coverage effective immediately, but also that they would get coverage for pre-existing conditions if they paid an extra month's premium.

Bailey admitted that he must have known that the Crowells had Liberty National medicare supplement policies when he was there on September 2, 1988. He also told the Crowells on September 2, 1988 that the Reserve National policy would pay more benefits or cover more benefits than the Liberty National policies that they already had in effect. In fact, Bailey admitted at trial that the Liberty National medicare supplement insurance policies on Ray and Myrtle were basically identical to the Reserve National policy he sold the Crowells. He stated that there was not much difference in the policies at all.

Bailey purposefully and intentionally checked "No" to questions 5 and 6 on the Reserve National application which dealt with whether the Crowells had any existing health insurance in effect and whether the Crowells intended to replace or change any existing insurance policies in connection with the application being taken for Reserve National. Bailey admits that he should have checked "Yes" to these two questions on the application.

Bailey admitted that he told the Crowells that their monthly premium on the Reserve National policy would

be $96.25 a month although he knew at that time that there would be another $10.55 added to their monthly premiums. He knew on September 2, 1988 that their total correct monthly premiums would in fact be $106.80. This was over $20 more per month than the premiums they had been paying on their Liberty National policies. Despite this knowledge, Bailey told the Crowells that their monthly premiums would only be $96.25.

After Bailey left the Crowells' home, and without the knowledge of the Crowells, Bailey began processing their application. A summary report of application (SRA) was prepared by Bailey and sent to Reserve National's home office. On the SRA, Bailey clearly showed that the Crowells were paying $106.80 for pre-existing benefit coverage. Bailey also submitted to Reserve National's home office with the SRA a letter which read "Concerning Ray Crowell, I collected $111.25 in cash, and his brother Joseph McVay wrote me a check for $96 for the rider which eliminates waiting periods. Phillip M. Bailey". Bailey's letter, the SRA, and the Crowells' application were received by Reserve National in Oklahoma City on September 12, 1988.

Again without the knowledge of the Crowells, Jeffrey A. Reeves, an underwriter in Reserve National's home office handled the Crowell application. Reeves admitted that the documents received from Bailey indicated to Reeves that the Crowells desired pre-existing benefit coverage. He received this information on September 13, 1988. Reeves acknowledged that the documents reflected that the Crowells did not want any waiting period for pre-existing conditions on their policy. Reeves further

admitted that Bailey told him on October 17, 1988 that the Crowells were replacing existing insurance coverage.

With this knowledge, the Home Office of Reserve National intentionally issued a policy to the Crowells that did not have pre-existing condition coverage. Reeves admitted that Reserve National does issue policies different from what customers requested. Reeves admitted that he never tried to call the Crowells on the telephone nor did he try to contact them in any fashion to inform them that the policy issued by Reserve National did not cover pre-existing conditions.

As stated earlier, all the conversations and communications between Bailey, Reeves, and the home office of Reserve National that occurred in September and October, 1988 were without the knowledge of the Crowells. On October 14, 1988 Myrtle had a heart attack and was transferred on October 17th from her local hospital to Birmingham. She was in Birmingham from October 17th through November 9th. At the time of transfer, the hospitals needed her insurance policy numbers. Ray requested Joe McVay to contact Reserve National and get a policy number. McVay contacted Reserve National's Montgomery office and was referred to the Home Office in Oklahoma City. McVay was told by the Oklahoma City office that the Crowell policy had been approved, and he was given the policy number. McVay then gave the policy number to Ray for filing with the hospitals. This was all done on October 17, 1988.

The Crowells received their Reserve National policy through the mail on November 15, 1988. When Myrtle skimmed through the policy, she noticed that the effective

date was wrong. It showed an effective date of November 3, 1988. Myrtle thought that the effective date should have been September 2, 1988 (the date of application) based on what Bailey had told them. Myrtle called the Home Office of Reserve National on November 15, 1988 and talked with a Mr. David Harvey. Myrtle told Harvey that she had received her policy that day and that the effective date was not correct. Harvey wanted to know why it was not correct and Myrtle told him that she had paid an extra premium for her policy to go into effect immediately and have pre-existing conditions coverage. Harvey told Myrtle that the extra premium that she paid was for pre-existing conditions coverage but that she had immediate coverage. Myrtle believed him. In reliance on what Mr. Harvey told Myrtle, she kept paying the premiums to Reserve National.

During the course of their November 15, 1988 conversation, Myrtle told Harvey about her heart problem and that she needed coverage for that. Myrtle also told Harvey that her other policy that she had with another company had lapsed in early October. Harvey admitted that Myrtle told him that she had a heart attack in mid-October and that she thought she was covered by her Reserve National policy. Harvey also admitted that Myrtle told him that it was her understanding that she had immediate coverage. Harvey admitted that Myrtle told him that she had let her old policy lapse. Harvey assumed that Myrtle was told by her agent that she would be covered immediately. Harvey reported this telephone call from Ms. Crowell to his supervisor, Ms. Phelps, because Ms. Crowell thought she had coverage,

and she did not. Harvey read his notes of his conversation with Myrtle to Ms. Phelps word for word. Harvey did not recall how Ms. Phelps responded.

After talking with Harvey, Myrtle received a sheet of paper from Reserve National with the date October 3, 1988 on it. She paid the Crowells' premium in November and December on the Reserve National policy. On January 11, 1989, Ray's prostate gland gave him problems, and he had to have surgery. The Crowells gave the hospital Ray's Reserve National insurance card. The hospital filed claims which were denied by Reserve National in May, 1989. The Crowells received two letters denying the claims saying the denial was for "pre-existing conditions". Myrtle and Ray continued paying their premiums every month and asked the hospitals to refile hoping that Reserve National would pay.

In September or October, 1989, the Crowells got a letter from the Credit Bureau based on Ray's medical bills not being paid. Myrtle called Dorothy Ziglar, her daughter, for help. It is stipulated by the parties that $875.01 would have been paid under Reserve National's policy if pre-existing benefit coverage would have been in existence. After learning that the doctor bills had not been paid by Reserve National and that the claims had been denied and after receiving collection letters, Myrtle became awfully nervous, stressed, strained and real shaky. Her legs were like jelly, and she had to sit down.

At the request of her parents, Dorothy Ziglar telephoned Reserve National on October 23, 1989. Dorothy asked for Dave Harvey who her mother had talked with 11 months earlier in November, 1988. Dorothy told

Harvey that Ray and Myrtle had paid an extra month's premium to get this coverage for pre-existing conditions. Harvey said that he only had proof that Ray and Myrtle had initially paid for one month. He told Dorothy to send proof of an extra payment. During the conversation, Dorothy told Harvey about her Uncle Joseph McVay writing a check and the receipt for monies that was left with her parents.

Dorothy identified Plaintiffs' Exhibit #32, a copy of the letter she wrote to Harvey. The letter reflected the discussion that Dorothy had with Harvey. The letter identified the agent, Phillip Bailey, of Montgomery, Alabama. Dorothy knew the agent's name while talking with Harvey on the phone. The letter repeated Dorothy's conversation with Harvey concerning the Crowells' payment of the extra month's premium to waive the six month waiting period for pre-existing conditions. The letter also confirmed that the Reserve National policy replaced another medicare supplement policy. Dorothy stated that, when she told Harvey this on the phone, he said that if the Crowells had paid the extra month's premium, they were covered but that he only had proof of them paying one month. Harvey said that he did know that it replaced another policy. Dorothy wrote the letter and gave it to her mother to put with the necessary attachments and mail to Reserve National. Harvey, or someone else from Reserve National, was to get back with Dorothy after receiving her letter.

Dorothy waited for a period of time after her letter and proof were mailed to Reserve National. After hearing nothing, she called back to Oklahoma City two or three times. She used the 800 number that Harvey had given

her. She talked with Harvey briefly a second time before he transferred her call to some unknown lady. Harvey admitted during this second conversation that he had received Dorothy's letter and things that he requested but that he had not heard anything else about the matter.

Dorothy told the lady to whom Harvey transferred Dorothy's call that she thought the bills should be paid. Neither the lady nor Harvey ever called Dorothy back. No one from Reserve National ever wrote or called Dorothy concerning her parents' situation.

Testimony was given by Ms. Louise Paulk and Ms. Barbara Mock concerning other instances where agents of Reserve National had misrepresented pre-existing benefit coverages. Ms. Paulk testified that she had been told by a Reserve National agent that the policy she was buying had pre-existing condition benefit coverage. When she filed her claim for benefits, it was denied by Reserve National which stated that conditions on which the claim was filed pre-existed the issuance of the policy. When her claim was denied, Ms. Paulk contacted the Home Office of Reserve National and told the people that her agent had told her that she was covered for her pre-existing health conditions by having paid premiums "three months in advance". After telling the Home Office this, Reserve National still did not pay her claims. Similar testimony was given by Ms. Mock.

At trial, Defendant Bailey admitted that although he was no longer employed by Reserve National, all his costs of defense including his present attorney fees were being paid by Reserve National. The jury awarded compensatory damages in the amount of $25,000 and punitive

damages in the amount of one million dollars against both Defendants. The trial court entered judgment in that amount.

B. POST-TRIAL PROCEEDINGS

Post-trial motions for new trial and judgment notwithstanding the verdict were filed by both Defendants. The trial court set a date for presentment of evidence by the parties on these motions. At the time of the hearing, Reserve National presented no evidence but merely argued its positions. Bailey did present evidence concerning his financial net worth. Thereafter, the trial court affirmed the compensatory award of $25,000 as to both Defendants. The trial court granted a new trial to Reserve National in the event the Crowells refused to accept a remittitur of the one million dollar punitive damage verdict to $600,000. The trial court also remitted the punitive damage verdict from one million dollars to $250,000 as to Bailey. The trial court stated that it found no pattern or practice of wrongdoing on the part of Bailey. The Crowells accepted the remittiturs of the trial court. An amended judgment was thereafter entered by the trial court.

Reserve National and Bailey appealed the trial court's rulings. The Crowells cross-appealed the issue of remittitur. On February 5, 1983 the Supreme Court of Alabama affirmed the trial court's decision in all respects. Reserve National filed an application for rehearing which was denied on March 19, 1993. On April 2, 1993 this Court granted Reserve National's application for stay of judgment of the Supreme Court of Alabama pending the

filing and review of Reserve National's Petition For A Writ Of Certiorari.

SUMMARY OF ARGUMENT

The Supreme Court of Alabama carefully reviewed the facts of this case as presented to the jury, as well as the trial court's post-trial order. Both the trial court and the Supreme Court of Alabama found that the facts in this particular case mandated a punitive damage judgment of $600,000.00. Both courts found there to be no constitutional violation of Petitioner's Due Process Rights.

Based on the particular facts of this case, the punitive damage award of $600,000.00 should not be overruled or reviewed further. The Alabama trial and appellate courts have provided Petitioner with Due Process guaranteed under the Constitution of the United States. Petitioner has benefited by the reduction of the original jury verdict as a result of Alabama's procedure followed by the trial and appellate courts in reviewing punitive damage awards.

United States Supreme Court Rule 10.1(c) is applicable to this Court's decision as to whether the Petition For A Writ Of Certiorari should be granted. There are no special or important reasons why this Court should exercise its judicial discretion to grant this petition. This Court has already approved the procedure followed in Alabama for review of punitive damages awards. Contrary to the assertion made by Reserve National, the trial court and Supreme Court of Alabama have followed this procedure. A jury verdict for punitive damages of one

million dollars has been reduced to $600,000 by the Alabama courts. Reserve National wants the verdict reduced more. Reserve National no longer contests the fact that its conduct gave rise to punitive damages in this case. Reserve National merely seeks relief in the form an additional remittitur. This is not a case in which this Court should exercise its judicial discretion by granting the Petition For A Writ Of Certiorari.

ARGUMENT

I. THE SUPREME COURT OF ALABAMA HAS FOLLOWED ALABAMA'S PROCEDURE FOR REVIEWING PUNITIVE DAMAGE VERDICTS AS APPROVED IN *HASLIP.*

This Court in *Pacific Mutual Life Insurance Company vs. Haslip,* 499 U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), ruled that Alabama's procedure for awarding punitive damages as well as post-verdict review, met the requirements of Due Process under the Fourteenth Amendment to the United States Constitution. The present case was tried after this Court's ruling in *Haslip* and under Alabama's new "Tort Reform" statutes. See Ala. Code § 6-11-20 (1975) (as amended) *et seq.* Under *Haslip,* the plaintiff was only required to meet a standard of proof for punitive damages based on the "preponderance of the evidence". In the present case, the Crowells were required to meet the higher standard of "clear and convincing evidence" of fraud by Defendants. This standard requires proof greater than a preponderance of the evidence or even the substantial weight of the evidence. Ala.

Code § 6-11-20(b) (4) (1975) (as amended). Additionally, the Crowells had the burden of showing that Reserve National was guilty of a pattern or practice of intentional wrongful conduct in order to exceed the legislatively created punitive damage "cap" of $250,000.00. Ala. Code § 6-11-21 (1975) (as amended). As noted in both the trial court's post-trial order and the Supreme Court of Alabama's opinion, this pattern and practice of intentional wrongful conduct was clearly proven.

Reserve National states in its brief that the Alabama courts refused to address Reserve National's Federal Due Process challenges and failed to adhere to Alabama's procedures for reviewing punitive damage verdicts. See Applicant's Petition For A Writ Of Certiorari, page 10 sub-topic A. This statement is not true.

Judge Phelps composed a lengthy order in which he discussed the directives and factors as outlined in *Green Oil Company vs. Hornsby,* 539 So.2d 218 (Ala. 1989) and *Hammond vs. City of Gadsden,* 493 So.2d 1374 (Ala. 1986). Appendix A These are the same standards which this Court approved in *Haslip.* Further, the trial court specifically found that its review of the punitive damage award in this case was in keeping with the ruling of this Court in *Haslip.* Appendix A, App. 16 As a result of this post-verdict review, the trial court *reduced* the punitive damage award from one million dollars to $600,000.00. Although the Crowells disagreed with but accepted the remittitur, the Crowells nevertheless recognize that Reserve National was entitled to a fair and impartial post-judgment review which it received and which resulted in a reduction of the punitive damage award by 40%.

Reserve National accuses the Supreme Court of Alabama of refusing to adhere to Alabama's procedures for reviewing punitive damage verdicts. Once again, this charge is false. Note the language of the Alabama Supreme Court in its opinion:

> We now address, in tandem with the following issue, the contention that the judgment was excessive even after the remittitur.
>
> On cross-appeal, the Crowells request this Court to reinstate the jury's $1,000,000 punitive damage award. Absent a finding that the remittitur was not supported by the directives of *Green Oil* and *Hammond, supra,* we will not do so. We have carefully examined the trial court's analysis of the amount of punitive damages, and we conclude that the court properly ordered a remittitur of $400,000.00 under the guidelines of *Green Oil* and *Hammond.* In setting aside the $1,000,000 verdict as flawed, the trial court recognized the fundamental, constitutionally guaranteed right to a trial by jury. Ala. Const. of 1901, art. I, § 11. Based upon the *Hammond* and *Green Oil* directives, a thorough review of the facts of this case, and a review of the amount of punitive damages awarded in other cases, the trial court determined that the jury's verdict went beyond the amount necessary to accomplish society's goal of punishment and deterrence, and it ordered a remittitur of $400,000. We cannot say that the trial court abused its discretion in so doing, and, therefore, we affirm the order of remittitur.
>
> *Reserve National Insurance Company vs. Crowell,* 614 So.2d 1005, 1010 (Ala. 1993)

If one would simply read the post-trial order and opinion, it is clear that the trial court as well as the Supreme Court of Alabama followed the procedure for review of punitive damage verdicts which has been approved by this Court in *Haslip*. Only if this Court is ready to overrule *Haslip* and find that Alabama's procedure for post-judgment review of punitive damage awards is unconstitutional should this Court even consider the granting of Reserve National's petition. The facts are clear from the record that Reserve National received a full and fair hearing under the constitutionally sound *Green Oil* and *Hammond* standards both at the trial court as well as appellate court level. Reserve National simply disagrees with the ruling of the Alabama courts on the amount of punitive damages.

II. THE SUPREME COURT OF ALABAMA HAS REFUSED TO ADOPT A "MATHEMATICAL BRIGHT LINE" BETWEEN CONSTITUTIONALLY ACCEPTABLE AND CONSTITUTIONALLY UNACCEPTABLE PUNITIVE DAMAGE VERDICTS.

In its brief, Reserve National recognizes the fact that this Court in *Haslip* stated that a "bright line" as to the amount of punitive damages cannot be drawn where it would be applicable in every case. This Court ruled:

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.
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> 111 S.Ct. at page 1043

In its application for rehearing to the Supreme Court of Alabama, however, Reserve National argues its ". . . disparity of the relationship of actual loss to punitive damage . . . " position. Reserve National contends that because of this Court's language in *Haslip* stating that the ratio of punitive damages to compensatory damages and/or out of pocket expenses was "close to the line", then certainly the punitive damage to compensatory and/or actual loss ratio in the present case is "over the line". Using a "back door argument", Reserve National is attempting to require the courts in Alabama to add an additional factor not authorized by *Green Oil* or *Hammond,* i.e. the punitive damage to compensatory damage award must not exceed a certain ratio with that particular ratio being something at or near the ratio of damages in *Haslip.*

This Court was careful in *Haslip* to rule that no mathematical bright line ratio could ever be established that would fit every case. This Court did not require in *Haslip* that the case be remanded to the Supreme Court of Alabama to consider this alleged "additional" ratio factor as argued by Reserve National. Indeed, the Alabama Supreme Court has rejected such an argument in *Associates Financial Services Company of Alabama vs. Barbour,* 592 So.2d 191 (Ala. 1991).

Reserve National is requesting this Court to either adopt for itself or require the Supreme Court of Alabama to adopt a "mathematical equation" that will place another "cap" on the amount of punitive damages which may be awarded in Alabama. Such a request should be addressed to the state's legislature as it was done in

Alabama's last legislative session. Fortunately for Alabama, the proposed legislation requiring a mathematical equation was defeated. In 1987, the Alabama Legislature spoke to the issue of punitive damage "caps". Those particular statutes were applied in the present case and in fact resulted in a reduction of the punitive damage award against the individual Defendant Phillip Bailey. Reserve National, however, because of its history of fraudulent conduct in other cases, did not fall within the protection of the $250,000.00 cap. Because Reserve National continues to perpetrate fraud on the citizens of Alabama, it desires for this Court to provide further protection to it in the form of a judicially created mathematical equation.

One of the purposes of punitive damages in Alabama is to deter intentional wrongful conduct. Sometimes, the intentional wrongful conduct is likely to produce little harm. On other occasions, the intentional wrongful conduct may be likely to produce great harm but in fact may only result in slight harm. Reserve National contends that the "actual losses" of unpaid medical expenses of $875.01 ($1202.09 with accrued interest as of February 15, 1991) is in fact "slight" harm to the Crowells. To Reserve National, $875.01 is very little money. To the Crowells, who are on fixed incomes and who had to borrow from their relatives a portion of the initial premium paid to Reserve National, $875.01 is a significant sum of money. Additionally, how can Reserve National contend that the "actual losses" in this case are only $875.01? The actual losses suffered by the Crowells were significantly more than monetary. The Crowells received collection letters and damage to their credit as a result of the unpaid medical bills. They became stressed and strained. Ray

Crowell, a husband of over 52 years, became "short" with his wife because of the financial stress they were under. This stress still continues even until today. The jury found compensatory damages to be $25,000. As of today, Reserve National has still not even paid the compensatory damage portion of the judgment.

The first factor in *Green Oil* for reviewing a punitive damage award states:

> Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.
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> 539 So.2d at page 223.

In applying this factor to the present case, the trial court could not have stated it any better:

> This case involved misrepresentations with regard to Medicare Supplement medical insurance. The policyholders were elderly and subject to being mislead. It is entirely foreseeable that elderly persons would be involved with Medicare Supplement insurance and that such older people could be easily mislead. The court finds that the harm to insureds, such as shown by the facts of this case, is grievous and, therefore, damages should be high.
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> Appendix A App. 11

The trial court's decision later affirmed by the Supreme Court of Alabama was that $600,000.00 in punitive damages bore a reasonable relationship to the harm that was likely to occur and which in fact did occur in this case.

Finally, it is important to note that this punitive damage judgment, based on what was presented to the trial court and the Supreme Court of Alabama, will not have any significant adverse financial impact on Reserve National. When given the opportunity at the post-trial hearing, Reserve National chose not to put on any evidence that even a one million dollar verdict would have a significant financial impact on it. Even at the appellate court level, Reserve National never proffered evidence or argument that the remitted punitive damage award of $600,000.00 would have an adverse financial impact. This point is argued because Reserve National has been guilty of other frauds in the past against Alabama citizens. On these other occasions, the settlement amounts were relatively small. Finally, Reserve National had to stand before a jury in Alabama and be judged for its wrongful conduct. Even Reserve National, however, is unable to argue that the punitive damage award in this case will have a significant impact on its financial position.

CONCLUSION

Respondents Crowells request this Court to enter an order denying the Petition For A Writ Of Certiorari filed by Petitioner Reserve National Insurance Company. Respondents Crowells further request this Court to enter an order lifting the stay of the judgment rendered by the

Supreme Court of Alabama, said stay having been filed on April 2, 1993. Further, Respondents Crowells request any relief to which they may be entitled with regards to the taxing of costs in opposing this petition.

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APPENDIX TO THE BRIEF OF RESPONDENTS RAY CROWELL AND MYRTLE CROWELL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

APPENDIX A

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

RAY CROWELL and MYRTLE CROWELL, Plaintiffs, VS. PHILLIP BAILEY and RESERVE NATIONAL INSURANCE CO., Defendants.	)	CASE NO. CV-90-1863

ORDER

This case is before the Court at this time on separate Motions for Judgments Notwithstanding the Verdict, or In the Alternative for New Trials, or In the Alternative for Remittitur filed respectively on behalf of Defendants, Phillip Bailey and Reserve National Insurance Company. On this submission, this Court has reviewed portions of the transcript of testimony, the Court's oral charge, and the briefs and argument of counsel.

The case involves allegations of legal fraud against both defendants stemming from alleged misrepresentations with regard to a Medicare Supplement medical insurance policy. The jury returned a verdict of $25,000 Compensatory and $1,000,000 Punitive.[1]

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[1] "We, the Jury, find the issues in favor of the Plaintiffs, Ray Crowell and Myrtle Crowell, and against both defendants, Phillip Bailey and Reserve National Insurance Co., and assess their damages as follows:

The evidence at trial was that Phillip Bailey went to the home of Ray and Myrtle Crowell on September 2, 1988 with regard to the sale of Medicare Supplement medical insurance. At that time, the Crowells already had this coverage with Liberty National Insurance Company. Mr. Bailey admitted at trial that at the time he sold the Reserve National Insurance policies to the Crowells, he knew that they already had the Liberty National Medicare Supplement policies and that he was told by the Crowells that they would be replacing these policies. Mr. Bailey still wrote on the application that they were not replacing coverage. Bailey admitted that he told the Crowells that upon payment of prescribed premiums they would have immediate coverage for any and all pre-existing conditions. The Crowells, in reliance on the representations made by Bailey, bought the Reserve National policy and thereafter dropped the Liberty National policies. After this, Reserve National told the Crowells that instead of a monthly premium of $96.25 as originally stated, the correct monthly premium would be $106.80.

Even though Bailey knew the Crowells had Liberty National Medicare Supplement Policies that were replaced by the Reserve National coverage, he checked

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$25,000	Compensatory
$1,000,000	Punitive
$1,025,000	TOTAL"

Note: The Court submitted alternate verdict forms to the Jury in accord with Section 37.05, Alabama Pattern Jury Instructions. June 1990, Supplement. See explanation as contained in Court's oral charge.

the question regarding "Policies In Force and Replacement – No". Mr. Bailey chose not to write on the application anything about Ray Crowell's pre-existing prostate condition even though the evidence was without dispute that the Crowells informed him of this pre-existing condition. Mr. Bailey did not obtain an executed replacement form even though he knew the Crowells were replacing their Liberty National Medical Supplement Policies when they purchased the Reserve National Medicare Supplement policy.

The Crowells permitted their Liberty National policies to lapse by choosing not to pay the premium. These Liberty National policies lapsed on October 1, 1988.

Ray Crowell had prostate surgery during a hospitalization that continued from January 11 through January 14, 1989. Upon claims being filed by Ray Crowell, Reserve National sent two (2) denial letters to Ray and Myrtle Crowell denying Ray Crowell's claims for the prostate operation because of the pre-existing prostate condition. These letters were dated May 8 and May 17, 1989. It was without dispute that Phillip Bailey failed to include in the Crowell's original application for the Reserve National policy anything about Ray Crowell's prostate condition, even though he had knowledge of this.

The Defendants claim that a new trial should be granted or a judgment entered notwithstanding the verdict or a remittitur granted in that the Court erred in submitting the issue of punitive damages to the jury; in submitting the claim of mental anguish to the jury; and, in allowing Plaintiffs to introduce evidence of other

alleged frauds involving other insureds. Defendants further contend that the court erred in permitting Plaintiffs to introduce evidence that Reserve National was paying for the legal defense and hotel accommodations for Phillip Bailey and further that the award of $1,000,000 in punitive damages under the facts of this case is excessive and should be subject to the limitation provision of Title 6-11-21,[2] *Code of Alabama,* 1975. The Defendants further contend that the award of punitive damages under the current posture of Alabama Law is violative of the Constitution of the State of Alabama and the Constitution of the United States.

Upon review of the Record and upon the Court's own recollection, this Court finds that there was ample evidence upon which the jury could have found the Defendants liable for willful, reckless, fraudulent misrepresentations within the provisions of Title 6-5-101, et seq. *Code of Alabama,* 1975. The Court thoroughly charged the jury from the Alabama Pattern Jury Instructions 18.00 et seq. and in accord with the statutory law of the State of Alabama pertaining to fraudulent conduct. There was substantial evidence as to willful, reckless fraud by both of the Defendants as well as deceit and suppression of the truth.

The issue of mental anguish was properly submitted to the jury. There was ample evidence from both Ray and Myrtle Crowell that they lost sleep, were nervous, argued more than they had in the past, suffered anxiety and

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[2] Defendants contend that the limitation should be applicable to both defendants or a new trial granted, since in Alabama damages cannot be apportioned between joint tortfeasors.

distress over the nonpayment of their medical bills as a result of Reserve National's fraud, they received dun letters from several medical providers and that this had worried them considerably. The Court gave detailed instructions with regard to mental anguish as a part of compensatory damages. See *Holcombe v. Whitaker*, 294 Ala. 430, at p. 433-434; and *Fidelity & Casualty Co. v. J. D. Pittman Tractor Co.*, 244 Ala. 354, at p. 358 (Ala. 1943). Specifically, the Court charged the jury as follows:

> "You are entitled to consider medical bills not paid, you are entitled to consider the law that says the general measure of recovery for fraud includes all damages within the contemplation of the parties or which are the necessary and natural and proximate consequence of the wrong. It's up to you all to determine what was in the contemplation of these parties, including if you are reasonably satisfied that mental anguish, worry, anxiety was in the contemplation of these parties, with that standard, that would be up to you, and if you are reasonably satisfied that mental anguish, worry, anxiety was in the contemplation of these parties, that they were the natural and consequences of this alleged wrong, then you would be entitled to consider that in your compensatory damages, to reasonably and fairly pay somebody for what they have lost or what they have been through.

Pursuant to § 6-11-21, *Code of Alabama*, 1975, an award of punitive damages cannot exceed $250,000.00 unless the award is predicated on one or more of the following:

> "(1) A pattern or practice of intentional wrongful conduct, even though the damage or

injury was inflicted only on the plaintiff; or,

(2) Conduct involving actual malice other than fraud or bad faith not a part of a pattern or practice; or,

(3) Libel, slander or defamation. (Acts 1987, No. 87-185, p. 251, §2.)"

The actionable misrepresentations by Phillip Bailey all occurred on September 2, 1988. These misrepresentations were made at the Crowells' house during the initial meeting between Phillip Bailey and the Crowells, at which time the application for insurance was filled out. The misrepresentations of Bailey each involved legal fraud. The evidence insofar as the misrepresentations of Bailey are concerned does not establish a continuous pattern or practice of "temporally separate" conduct within the provisions of §6-11-21. *Youngblood v. Lawyers Title Ins. Corp.*, 746 F.Supp. 71 (S.D. Ala. 1989). The Court does not find that the conduct of Bailey falls within any of the statutory exceptions to the $250,000.00 limitation.

There was evidence that the corporation, through employees and agents other than Bailey, did in fact follow a pattern or practice of intentional wrongful conduct with regard to the Plaintiffs and to other insureds insofar as the handling of pre-existing conditions. Specifically, on November 15, 1988, Myrtle Crowell spoke with David Harvey of Policy Service at the Home Office of the Company. Harvey restated to Mrs. Crowell the earlier misrepresentation of Bailey:

"The extra month's premium of $96.25 was for pre-existing benefit coverage." (See Plaintiffs' Exhibit 10).

The evidence establishes that this misrepresentation was made to Ms. Crowell at a time when the Home Office file contained information and facts indicating that the truth had not been told to the Crowells as to the policies they had purchased.

On October 23, 1989, Dorothy Zeigler, the Crowells' daughter, had a conversation with David Harvey regarding the denial of the claims. Dorothy Zeigler specifically told Mr. Harvey at that time of the misrepresentation made to her mother and father by Agent Bailey. Mr. Harvey told her to put this information in a letter and attach the applicable documents. On October 31, 1989, Reserve National received the letter from Dorothy Zeigler which restates the misrepresentation made to the Crowells by Agent Bailey, and specifically, the misrepresentation regarding pre-existing conditions. Reserve National did not respond to this letter. Thereafter, on February 23, 1990, Agent Phillip Bailey was relicensed and appointed by Reserve National to represent the Company in the selling of policies throughout the State of Alabama.

The evidence with regard to other insureds, Mrs. Paulk and Mrs. Mock, show that other agents of Reserve National misrepresented the truth to them regarding pre-existing condition coverage. [As to the admissibility of this evidence, see *Winn Dixie Montgomery, Inc. v. Henderson*, 395 So.2d 475 (Ala. 1981)].

The Court thus finds that the misconduct of Reserve National does, in fact, fall within the "pattern or practice of intentional wrongful conduct" exception, to the $250,000.00 limitation of punitive damages, i.e.

§6-11-21(1). The Court further finds that under the facts and circumstances of this case there was evidence of wrongful conduct of other agents of Reserve National in addition to Agent Bailey, which does show a "pattern or practice of intentional wrongful conduct"; thus, the legislatively imposed limitation on the award is not applicable here to the corporation.

This Court recognizes that historically the law in Alabama has been that damages cannot be apportioned between joint tortfeasors. However, in 1987 the legislature enacted the $250,000.00 limitation when one or more specified conditions are shown. Applying this statutory limitation to the facts of the instant case, this Court is of the opinion and finds that the application of the legislatively imposed limitation on the award against Agent Bailey is required. The "lump sum verdict" will stand subject to the remittitur hereinafter imposed. However, as to Agent Bailey, the Plaintiffs are entitled to collect up to $250,000.00 pursuant to the provisions of §6-11-21. No such statutory limitation applies to Reserve National.

The position of Reserve National throughout this case has been that Mr. Bailey was mistaken in his representations to the Crowells as to pre-existing condition coverage. The Company has consistently insisted that Bailey's conduct did not show intentional or willful fraud, deceit, or suppression of truth. The tendencies of Agent Bailey's testimony was consistent with the defense of Reserve National. Plaintiffs, over the Defendants' objections, were permitted to show that the Defendant, Reserve National, was paying the legal defense for Bailey and for his hotel accommodations during trial. The Court admitted this testimony on the limited issue as to bias on

the part of the witness. The Court gave the jury the following detailed limiting instruction:

> "Ladies and gentlemen, this is going to be admitted on a limited basis as far as payment, supplying this witness, this party with legal counsel, is going to be admitted before you for the limited purpose for you to use in whatever way that you deem appropriate to use it, as far as this witness's credibility. It's not admitted as substantive evidence, but it's admitted for whatever weight you want to give, if any, to the credibility of this witness, and whether he has any reason because of this supplying, alleged supplying of legal representation, whether that affords any basis to this witness to slant his testimony this way or that way. For that limited purpose, not for the substantive purpose, but for evidence of credibility or what the law calls bias, it's admitted for that limited purpose, for whatever weight if any that you all want to give to it."

An outside the presence of the jury hearing was held as to the admissibility of this evidence. This Court stated on the Record to counsel from *"McElroy's Alabama Evidence"* the following:

> "Whenever the trial court is faced with the admissibility of a question asked to elicit bias or the introduction of evidence showing bias, the better course seems to be that the court should rule for admission. A study of the decisions, for example, shows that nearly all reversals of trial rulings on offers of proof of a witness' bias have resulted from the rejection, rather than the reception, of the offered proof. That's one forty-nine point oh one, paren three of *McElroy*." See

McElroy's Alabama Evidence, §149.01 at Pg. 310, (3rd Ed. 1977), and Cases Collected *Alabama Digest*: Witnesses Key Number 363 et seq.

The common thread throughout all of the cases seems to be that the Court is afforded great latitude in determining the admissibility of evidence on the issue of bias. The Court finds that the evidence of Reserve National paying Bailey's legal expenses and for his hotel accommodations during trial was property [sic] admitted on the question of bias and as explained to the jury.

The law of punitive damages was thoroughly explained to the jury by virtue of the latest supplement to the *Alabama Pattern Jury Instructions* by reading in its entirety Alabama Pattern Jury Instruction 11.03 (Amended) – Punitive Damages. The Court also read §6-11-20, *Code of Alabama*, 1975, to the jury in its entirety. The Court clearly explained to the jury that punitive damages may not be awarded unless the plaintiff proves "by clear and convincing evidence" that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff' The definitions of fraud, wantonness and malice were given both from Alabama Pattern Jury Instruction 11.03 (Amended) and again from §6-11-20.

The Court explained the dual purpose of punitive damages, . . . by stating:

> " . . . the purpose of awarding punitive or exemplary damages, punitive or exemplary, to punish and to make an example of someone, is to allow a money recovery to the plaintiff by way of punishment of the defendant, and for the added purpose of protecting the public by deterring

the defendant and others from doing such wrong in the future."

The Court charged the jury as to the definition of "clear and convincing" both from Amended 11.03 of the *Alabama Pattern Jury Instructions* and from §6-11-20, Code of Alabama, 1975.

As the Court noted in writing on the Defendants' requested charges with regard to punitive damages, all of these charges were thoroughly and completely covered by reading the entire Alabama Pattern Jury Instruction charge, that is, Amended 11.03, and also by reading §6-11-20 in its entirety.

The Court will now review the issue of whether the punitive damages awarded herein were excessive. In doing so, the Court will follow the directives of the Supreme Court of Alabama as outlined in *Green Oil Company v. Hornsby,* 539 So.2d 218 (Ala. 1989), and *Hammond v. City of Gadsden,* 493 So.2d 1374 (Ala. 1986).

1. *THE HARM LIKELY TO OCCUR AND THE HARM THAT ACTUALLY OCCURRED.*

This case involved misrepresentations with regard to Medicare Supplement medical insurance. The policyholders were elderly and subject to being misled. It is entirely foreseeable that elderly persons would be involved with Medicare Supplement insurance and that such older people could be easily misled. The Court finds that the harm to insureds, such as shown by the facts of this case, is grievous and, therefore, damages should be high.

2. *THE DEGREE OF REPREHENSIBILITY OF DEFENDANTS' CONDUCT.*

The evidence shows that Defendant Bailey told Mr. Crowell that he was covered for his pre-existing prostate condition. The required premiums were paid. The Company continued to conceal the truth and to misrepresent the facts of no coverage to the Plaintiffs. The Defendant, Reserve National, had engaged in similar misrepresentations with regard to pre-existing conditions in the past.

3. *PROFIT.*

It was without dispute that additional premiums were charged for coverage that the Plaintiffs did not receive. Defendants charged and received these premiums but refused to pay benefits. The Court notes that ultimately Reserve National did pay the amount of Mr. Crowell's hospital and medical bills into Court.

4. *FINANCIAL POSITION OF THE PARTIES.*

The Defendant, Reserve National, did not take a position in Court that the award of $1,000,000 would place them in receivership or bankruptcy. Mr. Bailey did, however, take the position that the amount of $1,000,000 would ruin him. The Court notes that as hereinabove stated the award against Mr. Bailey is subject to the limitation imposed by §6-11-21.

5. *COST OF LITIGATION.*

The Court is aware that Plaintiffs incurred a great deal of expense in preparing this case. The Court takes judicial note that litigation of this nature is costly with depositions being taken throughout the country. Accordingly, the Court

finds that the verdict should be high enough to enable Plaintiffs, such as these, and their attorneys, to pursue this type of case.

6. *CRIMINAL SANCTIONS.*

There has been no evidence produced that criminal sanctions have been imposed upon either Reserve National or Agent Bailey for their conduct in connection with this matter. There were two other settlements in cases similar to this and as pointed out by the Defendants; the case of *Paulk v. Reserve National* settled for $14,000.00 and *Mock v. Reserve National* settled for $18,000.00. Neither of these cases show that the Company has been subjected to substantial punitive damages for exemplary purposes or for punishment.

7. *CIVIL ACTIONS.*

The aforementioned cases of *Paulk* and *Mock* are the only other civil actions that have been introduced here against Reserve National. Again, neither of these settlement awards evidence exemplary or punitive damages such as would be justified by the enormity of the wrong with regard to misrepresentations of coverage in regard to pre-existing conditions.

Our Supreme Court has repeatedly held that punitive damages need bear no particular relationship to the amount of compensatory or out-of-pocket expenses. In its *Hammond* order, the trial Court followed this basic guideline:

> "Punitive damages should not exceed an amount necessary to accomplish society's goals of punishment and deterrence, but the degree of punishment necessary to achieve those goals changes with each case." *Central Alabama Electric*

Cooperative v. Tapley, 546 So.2d 371, 377 (Ala. 1989).

From reviewing many cases on the subject of alleged excessiveness in punitive damages, the Court is reminded that a trial by jury is a fundamental, constitutionally guaranteed right, Art. I, §11, Const. of 1901, and, therefore a jury verdict may not be set aside unless the verdict is flawed, thereby losing its protection. In *Hammond*, the Court held that a jury verdict may be flawed in two ways.

> "First, it may include or exclude a sum which is clearly recoverable or not as a matter of law, or which is totally unsupported by the evidence, where there is an exact standard or rule of law that makes the damages legally and mathematically ascertainable at a precise figure. In these situations, a trial court may, and should, reduce or increase the amount of the verdict to reflect the amount to which the parties are entitled as a matter of law. Second, a jury verdict may be flawed because it results, not from the evidence and applicable law, but from bias, passion, prejudice, corruption, or other improper motive."

The Supreme Court recently held in ordering a remittitur in the case of *General Motors Corporation v. Helen Lewis Johnston*, January 24, 1992, as follows:

> "The presumption of correctness of a jury verdict can be overcome only by a *clear* showing that the amount of the award is excessive." *Green Oil Co.*, 539 So.2d 218 (emphasis added). "It is well understood that in considering the adequacy or excessiveness of a verdict, each case must be determined on its own facts, and that neither the trial court, nor this Court, may

> substitute its judgment for that of the jury." *Green Oil Co.*, 539 So.2d at 222, citing *City Bank of Alabama v. Eskridge*, 521 So.2d 931 (Ala. 1988); *Hammond*, 493 So.2d 1374.

The Supreme Court in *Green Oil Co. v. Hornsby*, supra, held:

> "Bearing in mind that punitive damages must not exceed an amount that will accomplish society's goals of punishment and deterrence, *it is possible for a jury to hear the evidence in the case, make findings of fact, correctly apply the law, and still, albeit unwittingly, assess damages that bear no reasonable relationship to the accomplishment of those goals.*" (Emphasis Added).

Based upon a thorough review of this case, and of the amount of punitive damages in other cases, this Court is of the opinion that the punitive damages award in this case is excessive and the Court orders a remittitur of $400,000. Even though the Court determines a remittitur to be necessary, the Court is of the opinion and finds that the evidence supports a punitive damages award of $600,000. The determination of excessiveness is based upon applying the law of *Hammond* and *Green Oil* that punitive damages should not exceed an amount necessary to accomplish society's goal of punishment and deterrence for the facts and circumstances of this case. This Court finds that an award of $600,000 will accomplish society's goals of punishment and deterrence and is the degree of punishment necessary to achieve the goal set forth in *Hammond* and *Green Oil Co.*, supra.

Finally, the Defendants contend in the motions *sub judice* that an award of punitive damages under the current posture of Alabama Law is violative of the Constitution of the State of Alabama and the Constitution of the United States. This issue was decided contrary to the Defendants' position in the case of *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

Accordingly, it is considered ORDERED, ADJUDGED and DECREED by the Court as follows:

1. The Motions of both Defendants are overruled as to the $25,000 award of compensatory damages.

2. The Plaintiffs are entitled to recover up to $250,000 in punitive damages from the Defendant, Phillip Bailey, in accord with the provisions of §6-11-21, *Code of Alabama*, 1975.

3. The Motion of Reserve National Insurance Company for a New Trial is overruled subject to the acceptance by the Plaintiffs of a remittitur of $400,000 within twenty-eight (28) days from the date of this Order.

4. The Motions in all other respects be, and the same are hereby overruled.

DONE this 4th day of March, 1992.

/s/ Joseph D. Phelps
JOSEPH D. PHELPS,
CIRCUIT JUDGE

cc: Steve Schmitt
Clay Hornsby
Phil Butler
Jim Garrett